Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

King, David
david.king@lls.edu
Shapiro, Julie
julie.shapiro@lls.edu
Strauss, Marcy
marcy.strauss@lls.edu
(213) 736-1077

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katia Shrayber
415 – 623 – 8540 | Yekaterina.shrayber@lls.edu

Honorable Kimberly Swank

Dear Judge Swank,

I am writing to express my strong interest in the judicial clerkship position in your chambers for the 2024 – 2025 term. My academic achievements, strong interpersonal and communication skills, and commitment to excellence in service make me an ideal candidate for this position.

My family immigrated to the United States when I was five from Transnistria, a republic unrecognized by most of the world, in Moldova—a country so small and unheard of that it became easier to say I am Russian than explain what a breakaway state is. As a child, I remember pulling out the index cards from the pockets of my overalls when I needed to use the bathroom, pointing, and waiting patiently for the teacher to nod yes. I was five years old, brand new to this country, and brand new to the English language. As early as eight, I was forced to translate legal documents for my parents. Being crammed in a two-bedroom apartment surrounded by generations of families searching for a better life wasn't weird. It was just my life, filled with hope and grit. The experiences during my childhood instilled a strong work ethic, tenacity, and ability to overcome obstacles.

During my time at law school, I have honed my legal research and writing skills and have gained practical experience through internships with the Honorable Judge Fitzgerald of the Central District Court of California and the Honorable Amy Pellman of the Los Angeles Superior Court. By conducting extensive legal research on complex issues and actively participating in the drafting and preparing of judicial opinions, I experienced significant growth in my legal reasoning and writing abilities. This hands-on experience deepened my appreciation for the meticulous analysis and attention to detail required of a clerk. Moreover, observing courtroom proceedings such as trials and sentencing hearings gave me valuable insights into courtroom procedures, evidentiary rules, and effective advocacy strategies. Interacting with the judge, law clerks, and chambers staff was an honor, and their guidance and wisdom greatly enriched my understanding of the legal profession. More importantly, these experiences deepened my excitement and desire to clerk.

As Chief Note and Comment Editor of the Loyola International and Comparative Law Review, I developed a meticulous attention to detail. Managing a team of editors strengthened my organizational and leadership abilities while deepening my understanding of legal scholarship. Serving on the Executive Board of the Entertainment and Sports Law Society has allowed me to collaborate with like-minded individuals while providing high level oversight to the organization. With these skills and my legal experience, I am confident in my ability to excel in a clerkship and positively impact the legal profession.

Thank you for considering my application! I have attached my resume, law school transcript, writing sample, and letters of recommendation for your review. I look forward to speaking with you about my qualifications and experience.

Sincerely,

Katia Shrayber

Katia Shrayber
415-623-8540 | yekaterina.shrayber@lls.edu

EDUCATION

LMU Loyola Law School — Los Angeles, CA
J.D. Candidate — May 2024
Rank/G.P.A: Top 25%/3.52 (Cumulative as of Summer 2023)
Law Review: Loyola of Los Angeles International and Comparative Law Review, *Chief Note and Comment Editor* (Fall 2022 – Present)
High Grades: Constitutional Law (A); Evidence (A); California Civil Procedure (A); Education Law (A); Law Review Research (A); Criminal Law (A-); Torts (A-); Ethical Lawyering (A-)
Publications: Yekaterina Shrayber, Note, *What's Said in the Booth Never Stays in the Booth: A Comparative Analysis of the Use of Rap Lyrics in American and English Criminal Trials*, LOY. L.A. INT'L & COMP. L. REV. (forthcoming 2024).

University of California, Santa Cruz — Santa Cruz, CA
B.A., dual degrees in Psychology and Film & Digital Media — June 2018
GPA: 3.5 (Psychology); 3.38 (Film & Digital Media)
Honors: Dean's Honor List
Activity: Research Assistant, Psychology Department (Fall 2015 – Spring 2017)

EXPERIENCE

Skarin Law — Los Angeles, CA
Summer Associate — June 2023 – August 2023
- Review case files, research legal issues, and prepare research memoranda regarding family law
- Conduct client intake interviews
- Propound and respond to discovery, including requests for production of documents

U.S. District Court, Central District of California — Los Angeles, CA
Judicial Extern to the Honorable Michael W. Fitzgerald — January 2023 – April 2023
- Researched criminal and civil procedural and substantive issues, including copyright and Anti-SLAPP
- Drafted bench memoranda and court rulings regarding motions to dismiss and summary judgment
- Observed hearings and trial proceedings

LMU Loyola Law School — Los Angeles, CA
Research Assistant to Professor Julie Shapiro — September 2022 – August 2023
- Performed legal research for Professor's Transaction Law and Entertainment Law Practicum
- Assisted with the coordination of *TechTainment*, an annual legal conference of 100+ attendees

Los Angeles Superior Court — Los Angeles, CA
Judicial Extern to the Honorable Amy M. Pellman — June – July 2022
- Analyzed and summarized case files
- Drafted court orders regarding various topics, including divorce, child support, and custody issues
- Observed pre-trial conferences, settlement conferences, and motion hearings

Iterable — San Francisco, CA
Workplace Experience Specialist — December 2019 – August 2021
- Maintained office workflow for 110 employees
- Built an office culture and employee experience centered around company values
- Coordinated recruiting by scheduling candidates and booking travel and accommodations

Enterprise for Youth — San Francisco, CA
Program and Communications Specialist — October 2018 – December 2019
- Facilitated and developed curriculum for job-readiness training for 100 high school students
- Evaluated and matched students with work-experience placements in a variety of fields

Campus, Advocacy, Resources, and Education — Santa Cruz, CA
Graphic Designer and Marketing Coordinator — September 2016 – March 2018
- Led and executed the development and design of all campaigns and workshops
- Drove social media strategy by coordinating daily content and tracking emerging research
- Educated campus community about sexual violence by presenting at workshops

ADDITIONAL INFORMATION

Language: Russian (Native Speaker)
Interests: Memoirs, true crime documentaries, food trucks, pop culture

LMU PROWL

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Search Go

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Display Transcript

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Birth Date: Jan 01, 1996
Student Type: Continuing

Curriculum Information

Current Program
College: Law
Campus: Loyola Law School
Major and Department: Law, Law

***Transcript type:UNOF is NOT Official ***

INSTITUTION CREDIT -Top-

Term: Law Fall 2021
College: Law
Major: Law
Student Type: Law First Time JD
Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWD	1001	Loyola Law School	JD	Criminal Law	A-	4.000	14.66		
LAWJ	1001	Loyola Law School	JD	Civil Procedure	B+	3.000	9.99		I
LAWJ	1002	Loyola Law School	JD	Legal Research and Writing	B+	2.000	6.66		I
LAWK	1001	Loyola Law School	JD	Torts	A-	2.000	7.33		I
LAWL	1001	Loyola Law School	JD	Property	B	5.000	15.00		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	53.66	3.35
Cumulative:	16.000	16.000	16.000	16.000	53.66	3.35

Unofficial Transcript

Term: Law Spring 2022
College: Law
Major: Law
Student Type: Continuing
Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWB	1001	Loyola Law School	JD	Contracts	B+	5.000	16.66		
LAWJ	1001	Loyola Law School	JD	Civil Procedure	B+	2.000	6.66		I
LAWJ	1002	Loyola Law School	JD	Legal Research and Writing	B+	2.000	6.66		I
LAWK	1001	Loyola Law School	JD	Torts	A-	3.000	11.00		I
LAWM	1011	Loyola Law School	JD	Introduction to Administrative Law	B+	3.000	9.99		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	50.99	3.40
Cumulative:	31.000	31.000	31.000	31.000	104.66	3.38

Unofficial Transcript

Term: Law Fall 2022
College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWA	4003	Loyola Law School	JD	Business Associations	B+	4.000	13.33		
LAWF	4003	Loyola Law School	JD	Copyright Law	B	3.000	9.00		
LAWI	4017	Loyola Law School	JD	Education Law	A	2.000	8.00		
LAWJ	2003	Loyola Law School	JD	Evidence	A	4.000	16.00		
LAWO	6031	Loyola Law School	JD	International and Comparative Law Review Staff	P	1.000	0.00		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	13.000	46.33	3.56
Cumulative:	45.000	45.000	45.000	44.000	150.99	3.43

Unofficial Transcript

Term: Law Spring 2023
College: Law
Major: Law
Student Type: Continuing
Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWC	2003	Loyola Law School	JD	Constitutional Law	A	4.000	16.00		
LAWG	4033	Loyola Law School	JD	International Trade	B+	3.000	9.99		
LAWJ	2004	Loyola Law School	JD	Ethical Lawyering	A-	3.000	11.00		
LAWJ	4005	Loyola Law School	JD	Judicial Process Field Placement	P	0.000	0.00		
LAWJ	5060	Loyola Law School	JD	Judicial Field Placement	P	3.000	0.00		
LAWO	6024	Loyola Law School	JD	International and Comparative Law Review Research	A	2.000	8.00		
LAWO	6031	Loyola Law School	JD	International and Comparative Law Review Staff	P	1.000	0.00		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	12.000	45.00	3.75
Cumulative:	61.000	61.000	61.000	56.000	195.99	3.50

Unofficial Transcript

Term: Law Summer 2023 Session I
College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWJ	4015	Loyola Law School	JD	California Civil Procedure: Practice & Procedure	A	2.000	8.00		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	2.000	8.00	4.00
Cumulative:	63.000	63.000	63.000	58.000	203.99	3.52

Unofficial Transcript

TRANSCRIPT TOTALS (JURIS DOCTOR) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	63.000	63.000	63.000	58.000	203.99	3.52
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	63.000	63.000	63.000	58.000	203.99	3.52

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Law Fall 2023
College: Law
Major: Law
Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAWC	4062	Loyola Law School	JD	First Amendment: Freedom of Expression	2.000	
LAWJ	4016	Loyola Law School	JD	Remedies	3.000	
LAWJ	4026	Loyola Law School	JD	Legal Drafting	2.000	
LAWJ	4045	AIFS U Salamanca - DO NOT USE	JD	Civil Litigation Practice I	3.000	
LAWO	6032	Loyola Law School	JD	International and Comparative Law Review Editor	2.000	
LAWP	4028	Loyola Law School	JD	National Security and Data Privacy	2.000	

Unofficial Transcript

[Overall Financial Aid Status | Financial Aid Eligibility Menu | Law School Ranking and GPA]

August 08, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

As an associate clinical law professor, I would like to take this opportunity to highly recommend Yekaterina “Katia” Shrayber for a judicial clerkship.

Katia was a student in my Legal Writing class at Loyola Law School during the 2021-2022 school year. Throughout the yearlong class, Katia impressed me with her strong work ethic and her good-natured demeanor. Katia consistently had an upbeat attitude, and I could always count on her to attend and actively participate in the class. Katia is a dedicated student: she completed all of her assignments on time, her legal writing skills are exemplary, and she has earned a Top 30% ranking in her class.

Since taking my Legal Writing course, Katia has continued to hone her research and writing skills as a judicial extern for both the Honorable Amy M. Pellman, Superior Court Judge in the Los Angeles Superior Court, and the Honorable Michael W. Fitzgerald, U.S. District Judge of the U.S. District Court for the Central District of California. As a judicial extern for Judge Pellman, Katia analyzed a wide variety of motions, presented her recommendations to the Court and drafted rulings. Similarly, for Judge Fitzgerald, Katia composed bench memoranda and performed extensive legal research on a variety of civil and criminal matters.

Based on her invaluable experience as a judicial extern, her commendable academic skills, and her strong work ethic, I offer high recommendation for Katia without reservation. If you have any questions regarding this recommendation, please do not hesitate to contact me.

Respectfully yours,

David King, Esq.
Associate Clinical Law Professor
Loyola Law School

August 08, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am pleased to write a letter of recommendation for Yekaterina ("Katia") Shrayber.

Katia has performed exceptionally well at Loyola Law School. Separate from academics, she is a standout individual. Katia is passionate about her work, has excellent judgment, and goes above and beyond expectations professionally.

I met Katia as a rising 2L. At the beginning of each semester, I post a comprehensive job description to find a research assistant (RA). Katia applied, we met, and I hired her without hesitation. Katia's contribution has been so valuable this past year that I asked her to work with me through Summer 2023 (and she accepted).

Katia approaches assignments with thoughtful questions, she has a wonderful attitude, and her work product is nearly flawless. As Director of the Entertainment & Media Law Institute (EMLI), I host numerous events throughout the school year. Katia's organizational skills are apparent from the way she tracks important dates to her preparation of summaries and spreadsheets. Regardless of the task, Katia displays professionalism, humility, and an eagerness to learn. I have witnessed Katia communicating with guest speakers and legal experts at events. Her questions spur dynamic conversation and discussion among guests and students.

Katia's opinions and input are insightful. The information she provided in a research memo was significant in my decision to add a "legal analysis and research" component to the Entertainment Law Practicum (ELP). There is a unique volume of work related to ELP and EMLI. Katia is mindful of deadlines and understands the importance of following up. Katia's responsibilities include acting as liaison with the entertainment student organizations (e.g., Entertainment & Sports Law Assoc.). Her interpersonal skills and relationships have been instrumental in the successful collaboration between the law school and these organizations.

Throughout my career, I have mentored and supervised many junior lawyers. I am confident that Katia will do an outstanding job and become an asset to your court.

Respectfully yours,

Julie A. Shapiro
Director, Entertainment & Media Law Institute; Associate Professor Julie.Shapiro@lls.edu

August 08, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing to highly recommend Yekaterina (Katia) Shrayber for a position as a law clerk in your chambers. Concededly, my interaction with Katia is somewhat limited: I was the advisor on an article she wrote involving the use of rap music as evidence of criminal activity. But in many critical ways, my work with Katia is the most relevant for evaluating the potential of a law clerk. And Katia excelled in every important attribute during our work together. First, she is an excellent writer. My critique rarely involved suggesting that she re-write any portion because it was unclear or grammatically incorrect. To the contrary, her writing was crisp and concise and persuasive. Second, Katia is extremely receptive to criticism and comments. She understood quickly all my suggestions, and always incorporated them into the next draft. Third, she is capable of digesting and analyzing difficult areas of the law. Her article involved difficult questions concerning comparative law, evidentiary questions, and first amendment issues. It often required thinking creatively. She was willing and highly capable of grappling with all of these difficult questions. Finally, Katia is a hard worker. We went through numerous drafts and Katia undertook all of the work enthusiastically and in great spirits. Katia attributes her strong work ethic to being an immigrant who came to this country at 5 years old without knowing English; I can only begin to imagine how difficult this experience must have been. This strong work ethic is evident in so many aspects of her life, and I witnessed it first- hand. I have no doubt that she would work incredibly hard as a judicial clerk and do whatever was needed to succeed at that endeavor.

As I mentioned, I did not have Katia as a student in any of the classes I teach (Criminal Procedure and First Amendment). So I can’t speak to how she performs in that arena. I do note that she did extremely well in numerous and varied courses at Loyola. And although her grades likely are not the highest you will undoubtedly encounter in your search, I was extremely impressed with the overall experience she would bring to the clerkship. She has an unusual amount of relevant externship experience as a judicial extern at both the federal and state level. Her responsibilities as a Note and Comment Editor on the Loyola International and Comparative Law Review, in addition to her work experiences bode well for her research and writing skills.

In sum, I believe you would find Katia a wonderful addition to your chambers and I recommend her without reservation.

Respectfully yours,

Marcy Strauss

Marcy Strauss - marcy.strauss@lls.edu - (213) 736-1077

Katia Shrayber
yekaterina.shrayber@lls.edu | 415 – 623 – 8540

Writing Sample

This writing sample is a bench memorandum written during my externship regarding a Motion to Dismiss Counterclaim. The memorandum reflects my independent research and analysis and has not been edited.

In accordance with Judge Fitzgerald's procedures, I have omitted case-identifying information and have not referred to individuals by their legal names.

BENCH MEMORANDUM

To: Judge Fitzgerald
From: Katia Shrayber
Re: Recommendation on Order re: Motion to Dismiss Counterclaim

Before the Court is Plaintiff's Motion to Dismiss Counterclaim (the "Motion") filed on [redacted]. Defendants (the two Defendants are herein referred to as "Father" and "Son") [redacted] filed an Opposition on [redacted]. Plaintiff filed a Reply on [redacted].

Statement of the Issues

Plaintiff commenced this action alleging that Father and Son conspired to defraud Plaintiff of millions of dollars of insurance benefits. Son filed a counterclaim bringing a negligence cause of action alleging that he was an intended third-party beneficiary of the contract entered into by Plaintiff and Father, and Plaintiff breached the written contract by failing and refusing to pay the full benefits due under the policy. Now, Plaintiff moves to dismiss counterclaim based on Plaintiff's lack of duty to Son.

Accordingly, there are three separate issues raised: (1) whether Plaintiff owed Son a duty of care, (2) can Son enforce the contract made between Plaintiff and Father, and (3) can Son bring a cause of action for breach of good faith.

Short Answers

I recommend that the Motion be **GRANTED** ***without leave to amend.***

First, Plaintiff did not owe Son a duty as he was not an intended beneficiary of the contract between Plaintiff and Father. Additionally, no legal precedent establishes the principle that having a special relationship in one context automatically imposes liability in a different context. Merely establishing a special relationship in the context where Son may be held liable to Plaintiff for negligence does not automatically imply that Plaintiff can also be held liable to Son for negligence. Son has not provided any legal authority to support his argument that his duty to provide truthful claim information gives rise to a reciprocal duty of care.

Second, Son cannot pursue a breach of contract cause of action as Son was not a third-party beneficiary to the contract.

Third, as Son had no contractual relationship with Plaintiff, he cannot bring a breach of good faith claim.

As the Plaintiff's contract is exclusively with Father, it seems unlikely that Son could allege any additional facts that would establish a duty of care towards him. Therefore, I recommend granting the motion without leave to amend, as it would likely be futile.

I. BACKGROUND

For the sake of readability, record citations have been omitted.

Plaintiff initiated this action by filing a complaint on [redacted]. Plaintiff filed the operative Second Amended Complaint ("SAC") on [redacted]. Plaintiff alleges that Father and Son conspired to defraud Plaintiff of $[redacted] of insurance benefits.

On or about [redacted], Plaintiff issued Father a Comprehensive Long Term Care Insurance Certificated (the "Certificate"). The Certificate provided coverage for Home Health Care or "skilled nursing or other professional services provided in Your Home." To qualify for the Home Health Care Benefit, Father must have been "unable to perform two or more activities of daily living." Benefits under the Certificate were only triggered if Father incurred actual expenses for care services rendered, meaning that Father needed to receive care in exchange for money, then submit invoices and other Proof of Loss to Plaintiff for benefits to be paid. Son, Father's stepson, was Fathers' paid caregiver.

Plaintiff performed seven periods of surveillance on Father, in addition to three periods of surveillance on Son over the course of a two-year investigation. Plaintiff states that during this period of surveillance, Son was never seen providing care to Father. According to Plaintiff, Defendants submitted or caused to be submitted to Plaintiff certain Proof of Loss and other papers and information in which Defendants represented that Father received paid care services from Son in the home on certain dates and at certain times to induce Plaintiff to pay benefits. Plaintiff alleges that Defendants represented to Plaintiff for more than two years that Father was entitled to be paid benefits under the certificate for care services he allegedly received from Son in the home each day.

Plaintiff asserts claims against both Defendants for fraud, civil theft, civil conspiracy, and restitution of benefits paid; negligence against each Defendant individually; and a request for declaration that the certificate between Father and Plaintiff is void.

Plaintiff prays for relief in the form of actual, compensatory, punitive, and statutory damages, attorney's fees and costs, and restitution of the benefits paid under the Certificate since a date to be determined by the Court. Additionally, Plaintiff seeks judicial declarations that the Certificate is void and that Plaintiff may retain some or all the premium paid for the Certificate.

Defendants filed their answer and counterclaims against Plaintiff on [redacted] ("Counterclaim"). Son alleges that he was an intended third-party beneficiary of the contract entered into by Plaintiff and Father. Son alleges that the intent and legal effect of the contract was to provide payment for Home Health Care benefits for home healthcare services received by Father and that Plaintiff breached the written contract by failing and refusing to honor its policy and has refused to pay full benefits due under the policy. Son brings a claim of negligence against Plaintiff. Son prays for relief in the form of general damages for failing to provide the promised benefits, loss of income, general damages for mental and emotional distress, special damages, and attorney's fees and costs.

Plaintiff filed a Motion to Dismiss Counterclaim of Son on [redacted].

II. DISCUSSION

Son asserts a single claim of negligence against Plaintiff.

Plaintiff contends that Son's negligence claim is inappropriately brought as Plaintiff owed no duty of care to Son because, under the Certificate, Plaintiff's only duty was to Father, the owner, and beneficiary of the Certificate, with whom Plaintiff was in contractual privity.

Alternatively, the Motion argues that the negligence claim is inadequately pled as it does not set forth factual allegations supporting that Plaintiff owed Son a duty or that Plaintiff had a special relationship with Son, breached that duty, or proximately caused any injury.

A. Negligence

"A plaintiff in any negligence suit must demonstrate a legal duty to use due care, a breach of such legal duty, and [that] the breach [is] the proximate or legal cause of the resulting injury." *Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 143, 241 Cal. Rptr. 3d 209 (2018) (citation omitted) (modifications in original). "The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Sav. & Loan Ass'n*., 231 Cal. App. 3d 1089, 1095, 283 Cal. Rptr. 53 (1991). "[A]bsent a duty, the defendant's care, or lack of care, is irrelevant." *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc*., 49 Cal. App. 4th 472, 481, 56 Cal. Rptr. 2d 756 (1996). "[T]he existence of duty is a pure question of law." *Modisette v. Apple Inc.*, 30 Cal. App. 5th at 143 (citation omitted) (modification in original). A duty of care "may arise through statute, contract, the general character of the activity, or the relationship between the parties." *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 803, 157 Cal. Rptr. 407 (1979).

There is generally no tort liability for pure economic loss caused by negligence and generally businesses are not required to endeavor to prevent pure economic losses from accruing to third parties. *See Kurtz-Ahlerz, LLC v. Bank of America, N.A.*, 48 Cal. App. 5th 952, 959, 262 Cal. Rptr. 3d 420 (2020); *QDOS, Inc. v. Signature Fin., LLC*, 17 Cal. App. 5th 990, 998, 225 Cal. Rptr. 3d 869 (2017) (internal citations omitted). Where there is a special relationship between the parties, however, a plaintiff may recover for economic losses incurred because of negligent performance of a contract. *Avago Technologies U.S., Inc. v. Venture Corp. Ltd*., No. C 08-03248 JW, 2008 WL 5383367, *6 (N.D. Cal. Dec. 22, 2008).

Plaintiff argues that Son does not identify a duty that Plaintiff owed him, and Plaintiff did not have a duty of care to Son based on the Certificate issued to Father. Further, Plaintiff contends that to the extent that there was an independent duty at all, which Plaintiff denies, it was to Father, not Son.

Plaintiff states that Son was neither a party to nor beneficiary of the Certificate. The Certificate states that "We, [redacted], promise to pay *You*, the Insured, the benefits provided in this Certificate." Father is identified as the insured at the top of the Certificate Schedule page. Son is not identified on the Certificate Schedule page or anywhere else in the Certificate. The Organization of the Certificate and the Home Health Care Benefit sections of the Certificate contemplates that the Certificate belongs to Father. The Certificate does not identify Son or caregivers generally as parties, beneficiaries, or third-party beneficiaries of the Certificate, nor does the Certificate mention third-party beneficiaries. Additionally, Father is the only payee identified in the Certificate. If benefits were approved, they

would be paid to Father, and then it was incumbent upon Father to pay his caregiver, whomever it may be.

Son argues that a duty to care exists because Plaintiff acknowledges "there exists a Special Relationship between Plaintiff and Son." Plaintiff's allegations state, "[n]otwithstanding the absence of direct contractual privity between Plaintiff and Son, there exists a Special Relationship between Plaintiff and Son of such a nature that Son may be held liable to Plaintiff for negligence in accordance with the principles articulated by the Supreme Court of California in *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979), and its progeny."

Plaintiff argues that the fact that Son had a duty to provide truthful claim information to Plaintiff does not create a reciprocal duty in Plaintiff to pay benefits or else face a negligence claim from Son.

That a special relationship exists in the context that Son may be held liable to Plaintiff for negligence does not automatically give rise to potential liability for Plaintiff to Son. Son does not cite any authority to support his argument that his duty to provide truthful claim information created a reciprocal duty of care.

Son argues that he has properly stated a claim for relief based on Plaintiff's allegedly negligent conduct, resulting directly in harm to Son. Son alleges that "as a direct and proximate result of Plaintiffs's breach of contract, Son suffered loss of employment, and has been damaged in an amount equal to lost income, plus interest, that amount increasing monthly, as a result of the conduct alleged herein." Son points to California Civil Code section 1714(a), which he states creates liability for injury caused by lack of ordinary care. Plaintiff claims that section 1714(a) is inapposite to the facts of this case.

Section 1714(a) is inapplicable here. Section 1714 provides: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." Cal. Civ. Code § 1714(a). "Despite its broad language, section 1714 does not impose a general duty to avoid purely economic losses." *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 920, 290 Cal. Rptr. 3d 834 (2022). Rather, "'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff." *Staats v. Vintner's Golf Club, LLC.*, 25 Cal. App. 5th 826, 833, 235 Cal. Rptr. 3d 236 (2018) (quoting *Coffee v. McDonnell-Douglas Corp.*, 8 Cal. 3d 551, 559, 105 Cal. Rptr. 358 (1972)).

Here, Plaintiff had no duty to act "for the benefit" of Son. Based on the Certificate, all of Plaintiff's obligations were to Father, and Son is neither a party nor beneficiary of the contract. There was no imposed obligation on Plaintiff to act on behalf of Son.

Alternatively, Son asserts Plaintiff owed him a duty of care under the factors identified in the California Supreme Court decision in *Biakanja v. Irving*, which outline instances where a negligence claim is not barred merely because the plaintiff is not in contractual privity with the defendant. Plaintiff argues that the *Biakanja* test is not relevant here.

In *Biakanja v. Irving,* 49 Cal. 2d 647 (1958), the defendant notary had prepared the will of the plaintiff's brother to leave the entire estate to the plaintiff. Due to the defendant's negligence, the will was improperly attested, and as a result, the plaintiff received only a one-eight share of the estate rather than its entirety as he would have under the will. *Id.* at 651. Specifically, California courts interpret *Biakanja* to state that "where the 'end and aim' of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third-party or the protection of that party's interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third-party is not a party thereto." *Adelman v. Associated Intern. Ins. Co.* 90 Cal. App. 4th 352, 363 108 Cal. Rptr. 2d 788 (2001) (quoting *Bjakanja*, 49 Cal. 2d at 649–650). There, the "end and aim" of the will was for the plaintiff to receive the benefits of the entirety of his brother's estate, which imposed a duty on the defendant. *Biakanja v. Irving,* 49 Cal. 2d at 650.

Here, the "end and aim" of the Certificate was not a benefit to a known third-party or protection of that party's interests. First, Son was not a known third-party as he was not mentioned anywhere in the contract. Second, Son's interests are not outlined anywhere in the Certificate either. Plaintiff could not have been aware that if the Certificate were not performed, Son would have suffered a loss. The Certificate existed for the benefit of Father in the event he needed home care in accordance with the terms and conditions of the contract. Son was simply a provider for those benefits.

I recommend the Court not reach the *Biakanja* factors. *See Janovich v. Wells Fargo Bank, N.A*., No. 221CV00402TLNKJN, 2022 WL 891277 (E.D. Cal., Mar. 25, 2022) (declining to reach *Biakanja* factors as the plaintiff's claims were not independent of the underlying contract as it clearly expressed its rights and obligations and the economic loss rule applied); *see also Randle v. Farmers New World Life Insurance Company*, No. B276579 2018 WL 2276347 at *6 (Cal. Ct. App., May 18, 2018) (holding that *Biakanja* is inapplicable as no contract existed between the

defendant and anyone else that was made to provide a benefit for the plaintiff or protect her interests).

Additionally, Plaintiff argues that failure to perform under an insurance contract typically cannot be the factual basis of a negligence case. "[N]egligence is not among the theories of recovery generally available against insurers." *Sanchez v. Lindsey Morden Claims Servs. Inc.*, 72 Cal. App. 4th 249, 254, 84 Cal. Rptr. 2d 799 (1999); *see also Doyle v. Safeo Ins. Co. of Am.*, No. CV F 08-1587LJO GSA, 2008 WL 5070055, at *6 (E.D. Cal. Nov. 26, 2008) ("California courts prohibit negligent investigation and adjustment claims against insurers."); *Adelman v. Associated Intern. Ins. Co.* 90 Cal. App. 4th 352, 363 108 Cal. Rptr. 2d 788 (2001) ("An insured can recover in tort against an insurer for the improper handling of a claim only upon a showing that the insurer acted in bad faith; as we explain, such a showing requires something more than simple negligence."). Moreover, since an insured "is limited to its breach of contract remedy," plaintiffs, who are third parties and not insureds, are not entitled to recover for "negligence in performing the same contract" to "extend greater rights to uninsured parties than the law grants to insureds. *Doyle v. Safeo Ins. Co. of Am.*, 2008 WL 5070055, at *7.

As a person not insured under the Certificate, Son cannot pursue a claim against Plaintiff based on allegations that Plaintiff negligently performed the Certificate.

Accordingly, I recommend that given that Plaintiff did not owe a duty to Plaintiff, the Court need not consider the remaining elements of negligence.

B. Breach of Contract

Son states that he does not specifically allege a breach of contract cause of action against Plaintiff. However, Son's negligence claim alleges "as a direct and proximate result of Plaintiff's *breach of contract*, Son … has been damaged." Son argues that he is a third-party beneficiary of the Certificate because the purpose of the Certificate was to assure the presence of a paid caregiver. Son contends that he is, therefore, a member of the class of persons whom the Certificate was intended to benefit. Plaintiff disagrees that the Certificate made Son a beneficiary, arguing that Son is properly categorized as an ancillary service provider who could not have directly initiated a claim for benefits under the Certificate.

California law provides that a third-party may enforce a contract when the contract was made expressly for the benefit of the third-party. Cal. Civ. Code § 1559; *See Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524, 117 Cal. Rptr. 2d 220 (2002). The test to determine whether a contract was made for the benefit of a third person is

whether an intent to benefit a third person appears from the terms of the contract. *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1022, 90 Cal. Rptr. 3d 453, 468 (2009). Establishing this intent is a question of ordinary contract interpretation. *Garcia v. Truck Ins. Exch.,* 36 Cal. 3d 426, 436, 204 Cal. Rptr. 435 (1984). "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress,* 402 F. Supp. 3d 615, 662 (N.D. Cal. 2019).

In *Harper v. Wausau Ins. Co*., 56 Cal. App. 4th 1079, 1090, 66 Cal. Rptr. 2d 64 (1997), the court found that a third-party claimant was entitled to medical payments under the insured's general liability policy. The insurance policy indicated that it is meant to directly confer a benefit upon third parties who are injured, and as such the insurer directly undertook an obligation to pay the medical expenses of any persons on the insured property. *Id*. Accordingly, the payments were plainly intended to directly benefit plaintiff and were not incidental or remote. *Id.*

Here, the Certificate contains no express language that states an intent by Plaintiff to benefit Son. Plaintiff's payment of benefits to Father which he subsequently paid to Son does not make Son a beneficiary, as these were merely incidental benefits. *Compare Yazdi v. Aetna Life & Cas. (Bermuda) Ltd.,* No. CV 18-08345-CJC(SSX), 2018 WL 6443090, at *3 (C.D. Cal. Nov. 1, 2018) (dismissing breach of contract claim brought by third-party dentists seeking reimbursement for dental services to student-insureds because the policy was made for the express benefit of student-insured and did not expressly benefit downstream payees such as dentist), *with Harper v. Wausau Ins. Co*., 56 Cal. App. 4th 1079, 1090, 66 Cal. Rptr. 2d 64 (1997) (plaintiff was an intended beneficiary where insurance policy expressly indicated that it meant to confer a benefit upon third parties who were injured on the defendant's insured's property). *See also Andrew Smith Co. v. Paul's Pak, Inc*., 754 F. Supp. 2d 1120, 1133 (N.D. Cal. 2010) (lettuce supplier not third-party beneficiary of the contract between salad producer and salad marketer even though contract incidentally benefited lettuce supplier); *see also Ochs v. PacifiCare of Cal.,* 115 Cal. App. 4th 782, 9 Cal. Rptr. 3d 734 (2004) (health care service provider's agreement to pay for medical care is intended to benefit the enrollees, not the treating physicians with whom there is no contractual relationship); *see also IV Solutions, Inc. v. United HealthCare Services, Inc.*, No. CV1609598MWFAGRX, 2017 WL 3018079 (C.D. Cal., July 12, 2017) (health care provider was not a third-party beneficiary of an agreement between an insurer and an intermediary for the payment of medical care under an insurance providers contract as the intended benefit of the contract was to the insurer's members).

Like in *Yazdi,* no factual allegations support a claim that Son was a third-party beneficiary of the Certificate. 2018 WL 6443090 at *3. Son does not point to a provision in the Certificate that suggests that he is a third-party beneficiary. As in *Yazdi*, Plaintiff was not obligated by contract to pay *Son* for services rendered to Father; the Certificate states that Plaintiff will reimburse *Father* for the costs he incurs for home health care services. The Certificate is a contract between Plaintiff and Father. The terms of the Certificate do not suggest that Plaintiff and Father entered into this contract for the purpose of benefiting Son. By helping pay Father for home care services provided by Son, the Certificate may have incidentally benefitted Son since Plaintiff had a separate contractual obligation to pay Father for home care services. It cannot be discerned where in the Certificate either Plaintiff or Father expressed an intent to enter into the Certificate for Son's benefit.

Accordingly, Son has no basis for asserting a breach of contract claim against Plaintiff.

C. Good faith

Son alleges that his negligence claim arises from Plaintiff's alleged tortious conduct, which is the same conduct Father is bringing a cause of action for breach of the covenant of good faith.

Every contract, insurance or otherwise, imposes on each party a covenant of good faith and fair dealing in its performance and enforcement. *Foley v. Interactive Data Corp*, 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211 (1988). Only one with the right to sue an insurance company for contract damages for breach of the insurance policy can also sue the insurance company for tort damages for breach of the covenant of good faith. *Wexler v. California Fair Plan Ass'n*, 63 Cal. App. 5th 55, 62, 277 Cal. Rptr. 3d 398, 404 (2021).

Accordingly, Son cannot sue for bad faith because he had no contractual relationship with Plaintiff. Son was not a signatory, an additional insured, or a third-party beneficiary. The Certificate named Father as the contracting party. Son cannot expand Richard's claim of breach of good faith to his own.

Plaintiff, therefore, did not owe a duty to Son, and Son's Counterclaim is insufficient for that reason.

D. Leave to Amend

Under Rule 15, courts are instructed to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The district court has the discretion to deny leave to amend "due to 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.'" *Zucco Partners, LLC v. Digimarc Corp*., 552 F.3d 981, 1007 (9th Cir. 2009), as amended (Feb. 10, 2009) (quoting *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir.2008). Although a district court should grant the plaintiff leave to amend if additional factual allegations can possibly cure the complaint, dismissal without leave to amend is appropriate if it is clear that the complaint could not be saved by amendment. *Somers v. Apple, Inc*., 729 F.3d 953, 960 (9th Cir. 2013).

Because Plaintiff's contract is explicitly with Father, there does not appear to be additional facts that Son can allege that would give rise to a duty of care owed to him. Accordingly, I recommend that amendment of Son's counterclaim for negligence is futile.

III. CONCLUSION

I recommend that the Court **GRANT** the Motion ***without leave to amend***.

Applicant Details

First Name	**Zachary**
Middle Initial	**W**
Last Name	**Smith**
Citizenship Status	**U. S. Citizen**
Email Address	**z.westonsmith@gmail.com**
Address	**Address** Street **5333 Old Main St. Unit A** City **Henrico** State/Territory **Virginia** Zip **23231** Country **United States**
Contact Phone Number	**9199860882**

Applicant Education

BA/BS From	**University of North Carolina-Greensboro**
Date of BA/BS	**May 2015**
JD/LLB From	**The University of Alabama School of Law** **http://www.law.ua.edu**
Date of JD/LLB	**May 4, 2019**
Class Rank	**Below 50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Uvaldo Herrera Hispanic National Bar Association Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gibbons, Gregory
gregory.k.gibbons.mil@army.mil
(804) 691-6768
O'Malley, Gregory
gregory.t.omalley.mil@army.mil
Fogle, Cameron
cfogle@law.ua.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dear Judge Swank,

My life and work experience to this point have given me a unique perspective—one that distinguishes me from other applicants, and one that, I believe, would be an asset to your chambers. Before law school, I studied classical music composition and classical saxophone performance. I cultivated my deep appreciation for the arts and had the opportunity to work among an incredible, diverse group of people at the School of Music, Theater, and Dance.

I was not a good student in college, though. As a lifelong musician, I assumed that studying something I was passionate about would be enough to make the work fulfilling, but I was aimless, and it showed. I eventually learned that passion was necessary—but not sufficient—for high-quality work; passion, coupled with challenging, meaningful work in the service of others, is what gives me purpose. In the nick of time, I salvaged my poor undergraduate performance to move on to law school and, eventually, to service of others in the U.S. Army Judge Advocate General's Corps.

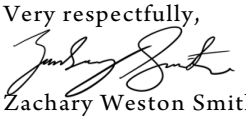
After my undergraduate studies, but before enrolling in law school, I followed in the footsteps of so many other classical composers and saxophonists before me and tried my hand at software development. This period of my life reinforced for me the importance of attention to detail: the computer doesn't care what you mean, only what you say. Precision is paramount in software development just as it is in the law. I was also fortunate to be able to do this work for a company that provides medical imaging services, lending the work an additional layer of importance given the direct impact it had on doctors and patients.

In law school, I demonstrated strong legal writing and advocacy skills. During my 2L year, I interned for United States District Court Judge L. Scott Coogler of the Northern District of Alabama. I earned top marks in the Judicial Opinion Drafting course offered my 3L year; my writing sample is a mock Supreme Court Opinion for *Maryland-National Capital Park and Planning Commission v. American Humanist Association*, authored during the pendency of the real case before the Supreme Court. Additionally, my moot court team won the HNBA 24th Annual Uvaldo Herrera National Moot Court Championship.

Currently, I serve as a judge advocate in the United States Army, stationed at Fort Gregg-Adams, Virginia. I have had the privilege of delving into a diverse range of legal matters, and I was hand-selected to work extensively on constitutional law issues related to the mandatory COVID-19 vaccines. I efficiently and thoroughly researched the relevant law—case law, statutes, Department of Defense Instructions, and Army Regulations, alike. I then distilled the rules into a model legal review for use across Fort Gregg-Adams in analyzing individual requests for religious exemption from the vaccine mandate.

I am a quick study and a hard worker. My strong research and writing skills, my attention to detail, and my unique experience make me an excellent candidate for a clerkship in your chambers. Also, I would love to live and work in eastern North Carolina, near most of my family. You can reach me by phone at (919) 986-0882 or by email at z.westonsmith@gmail.com. I look forward to speaking with you.

Very respectfully,



Zachary Weston Smith

ZACHARY W. SMITH

JUDGE ADVOCATE, U.S. ARMY

CONTACT

919.986.0882

z.westonsmith@gmail.com

EDUCATION

Juris Doctor

University of Alabama School of Law

2016-2019

Bachelor of Arts - General Music

UNC Greensboro

2009-2015

AWARDS

National Champion
HNBA 24th Annual Uvaldo Herrera National Moot Court Championship

LENS Scholar
Duke University School of Law, 2019

George Peach Taylor Advocacy Award
Trial Advocacy Competition Team, 2018

VOLUNTEER

American Society for Echocardiography
Sirsa, Haryana, India
Provided volunteer technical support on a medical mission in rural northern India.

LANGUAGES

English - Fluent

Spanish - Conversant

WORK EXPERIENCE

United States Army Judge Advocate General's Corps

Chief of Federal Litigation / Special Asst. U.S. Atty. — Present

- Serve as section chief and sole dedicated prosecutor for civilian Federal crimes committed within the special territorial jurisdiction of the United States on Fort Lee, Virginia

Military Justice Advisor — Present

- Advise military commanders (3 Colonels, 4 Lieutenant Colonels, and 9 Captains) on military justice and other legal issues

Administrative Law Attorney — 2021-2022

- Spearheaded religious exemption request process for the mandatory COVID-19 vaccines on Fort Lee (researched and wrote model legal review discussing RFRA and Free Exercise Clause implications)

Legal Assistance Attorney — 2020-2021

- Served as the Officer-in-Charge of the Fort Lee Tax Assistance Center and led a team of 10 Soldiers to provide free personal income tax preparation services
- Prepared and executed wills, powers of attorney, advance medical directives, and other legal documents for Soldiers, Retirees, and their families

Legal Intern — 2018

- Drafted prosecution memoranda; assisted with preparation for courts-martial

Core Sound Imaging

Cyber Security Specialist — 2019-2020

- Managed development of information security management system; worked to achieve ISO 27001 compliance; evaluated ongoing needs for cyber security (e.g., penetration testing, application firewall installation)

United States Congress

Law Clerk, House Cmte. on Oversight and Gov't Reform — 2018

- Legal research and writing for Information Technology Subcommittee
- Worked on artificial intelligence computer script to summarize FISMA IG reports

United States District Court, Northern District of Alabama

Judicial Intern, Judge L. Scott Coogler's Chambers — 2017-2018

- Researched and wrote draft memoranda of opinion on motions to dismiss and motions for service by publication
- Researched and contributed to Social Security Disability Benefit appeal opinion

The University of Alabama

Tuscaloosa, Alabama 35487

OFFICIAL ACADEMIC TRANSCRIPT

SSN: ***-**-9770 Date of Birth: 14-APR Date Issued: 20-NOV-2022

Record of: Zachary Smith Page: 1
Issued To: ZACHARY SMITH
Z.WESTONSMITH@GMAIL.COM

Course Level: Law

Current Program:
Juris Doctor
College : Law School
Major : Law

Degrees Awarded: Juris Doctor 04-MAY-2019
Primary Degree:
College : Law School
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2016						
Law School						
Law						
LAW	602	Torts	4.000	B+	13.320	
LAW	603	Criminal Law	4.000	B+	13.320	
LAW	608	Civil Procedure	4.000	C+	9.320	
LAW	610	Legal Research/Writing	2.000	B	6.000	
LAW	713	Intro to Study of Law	1.000	P	.000	
	Ehrs:	15.000 QPts:	41.960			
	GPA-Hrs:	14.000 GPA:	2.997			
Good Standing						
Spring 2017						
Law School						
Law						
LAW	600	Contracts	4.000	B+	13.320	
LAW	601	Property	4.000	B	12.000	
LAW	609	Constitutional Law	4.000	B+	13.320	
LAW	648	Legal Research/Writing II	2.000	B	6.000	
LAW	742	Legislation and Regulation	2.000	B	6.000	
	Ehrs:	16.000 QPts:	50.640			
	GPA-Hrs:	16.000 GPA:	3.165			
Good Standing						
Fall 2017						
Law School						

********** CONTINUED ON NEXT COLUMN **********

Term Information continued:
Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW	642	Evidence	3.000	B+	9.990	
LAW	662	Secured Transactions	3.000	B	9.000	
LAW	700	Appellate Advocacy	2.000	B+	6.660	
LAW	723	Law And Economics	2.000	B-	5.340	
LAW	728	Trial Advocacy Competn	3.000	P	.000	
LAW	763	Intl Environmental Law Seminar	2.000	B+	6.660	
	Ehrs:	15.000 QPts:	37.650			
	GPA-Hrs:	12.000 GPA:	3.138			
Good Standing						
Spring 2018						
Law School						
Law						
LAW	638	Political & Legis Writing	2.000	B+	6.660	
LAW	733	Federal Legislative Externship	10.000	P	.000	
	Ehrs:	12.000 QPts:	6.660			
	GPA-Hrs:	2.000 GPA:	3.330			
Good Standing						
Fall 2018						
Law School						
Law						
LAW	660	Legal Profession	3.000	A-	11.010	
LAW	665	Civil Law Clinic (Casework)	4.000	A-	14.680	
LAW	665	Civil Law Clinic Class	2.000	B+	6.660	
LAW	705	Altern Disput Resolutn	2.000	B-	5.340	
LAW	735	Criml Procedure Pretrial	3.000	B+	9.990	
LAW	744	Legislative Drafting	2.000	B	6.000	
	Ehrs:	16.000 QPts:	53.680			
	GPA-Hrs:	16.000 GPA:	3.355			
Good Standing						

********** CONTINUED ON PAGE 2 **********

K.H. Foshee
University Registrar

This transcript processed and delivered by Parchment

The University of Alabama

Tuscaloosa, Alabama 35487

OFFICIAL ACADEMIC TRANSCRIPT

SSN: ***-**-9770 Date of Birth: 14-APR Date Issued: 20-NOV-2022

Record of: Zachary Smith Page: 2
Level: Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2019						
Law School						
Law						
LAW	645	Business Organizations	3.000	B	9.000	
LAW	657	Moot Court Intersch Comp Team	2.000	P	.000	
LAW	715	Judicial Opinion Drafting	2.000	A	8.000	
LAW	731	Privacy & Data Security Law	2.000	B-	5.340	
LAW	769	Poverty Law	2.000	B+	6.660	
LAW	778	The Business of Being a Lawyer	1.000	P	.000	
LAW	798	Special Research	2.000	A	8.000	
LAW	822	Spanish for Lawyers	2.000	P	.000	
Ehrs: 16.000 QPts: 37.000						
GPA-Hrs: 11.000 GPA: 3.364						
Good Standing						
********** TRANSCRIPT TOTALS **********						
INSTITUTION	Ehrs: 90.000	QPts: 227.590				
	GPA-Hrs: 71.000	GPA: 3.205				
TRANSFER	Ehrs: 0.000	QPts: 0.000				
	GPA-Hrs: 0.000	GPA: 0.000				
OVERALL	Ehrs: 90.000	QPts: 227.590				
	GPA-Hrs: 71.000	GPA: 3.205				
********** END OF TRANSCRIPT **********						

K.H. Foshee
University Registrar

This transcript processed and delivered by Parchment

THE UNIVERSITY OF ALABAMA
Office of the University Registrar
Box 870134
Tuscaloosa, Alabama 35487-0134
(205) 348-2020
registrar@ua.edu

TRANSCRIPT GUIDE

The University of Alabama does not issue partial transcripts of a student's record.

ACADEMIC BANKRUPTCY - Academic Bankruptcy involves an undergraduate student's request to retroactively withdraw from one academic term due to extenuating circumstances. If granted, all courses taken during the term in question will be graded "W" (Withdrawn). No more than one petition for Academic Bankruptcy may be approved during a student's academic career at The University of Alabama. A notation regarding the Academic Bankruptcy will appear under the term in which the request was granted.

ACADEMIC SECOND OPPORTUNITY - Students who have been separated from The University of Alabama for at least three academic years may petition to apply for readmission through Academic Second Opportunity. If approved, all previous institutional academic work remains on the student's permanent record, but the grades for previous work are no longer used in computing the grade point average (GPA). Grades of "C-" or higher are changed to grades of "P" (Pass) and may be applied to a degree program. All grades of "D+" or lower are removed from the GPA calculation. These changes apply only to coursework completed at The University of Alabama. A notation regarding the Academic Second Opportunity will appear on the transcript.

ACADEMIC STANDING - A student's academic standing is computed based on the total number of earned hours and a student's institutional GPA. A student's current academic standing at the time of transcript printing is reflected under the last term completed. Students with an academic standing of "Good Standing" or "Academic Warning" are considered eligible to return.

ACCREDITATION - The University of Alabama is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award baccalaureate, masters, educational specialist, and doctoral degrees. Contact the Commission on Colleges at 1866 Southern Lane, Decatur, Georgia 30033-4097 or call 404-679-4500 for questions about the accreditation of The University of Alabama.

CALENDAR - The University of Alabama operates under a semester system. The University's academic calendar is divided into fall, spring, and summer semesters.

CLASSIFICATIONS - The University of Alabama classifies students based on earned hours as follows:
Undergraduate
Freshman: 0 - 30.999 semester hours
Sophomore: 31 - 60.999 semester hours
Junior: 61 - 90.999 semester hours
Senior: 91 or greater semester hours
Law
First-year law student: 0 - 29.999 semester hours
Second-year law student: 30 - 53.999 semester hours
Third-year law student: 54 or greater semester hours

COURSE NUMBERING SYSTEM - The proper interpretation of course numbers of The University of Alabama is as follows:
001-099: Remedial non-credit courses
100-199: Primarily for freshmen
200-299: Primarily for sophomores
300-399: Primarily for juniors
400-499: Primarily for seniors
500-699: Primarily for graduate and law courses
700+: Professional courses for law and medical students

FORGIVENESS POLICY – Discontinued November 1, 2001, students enrolled in undergraduate programs at The University of Alabama were allowed to drop a maximum of three courses taken at the University from the computation of the GPA. Courses not computed in the GPA could not be applied toward baccalaureate degree requirements. These courses and grades remained on the transcript but were excluded from earned hours and the GPA. Once a course was dropped from GPA computation under this policy, the grade and credit could not be restored.

FULL-TIME STATUS - The University of Alabama defines full-time status as follows:
Undergraduate: 12 semester hours
Graduate: 9 semester hours
Law: 10 semester hours
Medical: 12 semester hours

GRADING SYSTEM - The University of Alabama utilized a 3 point grading system from 1831 through August 1983 (summer term). Effective fall semester 1983, The University of Alabama converted to a 4 point grading system. Beginning fall semester 1994, the University moved to a plus/minus grading system for those students who had no previous higher education work. The value of the A+ changed from 4.0 to 4.33 effective with the fall semester 1999. The maximum overall GPA a student can earn is 4.0. The following grade notations are used in computing the Grade Point Average (GPA - the quotient of quality points divided by quality hours):

Grade	Grade points per hour credit	
A+	4.33	
A	4.0	
A-	3.67	
B+	3.5	(Law students beginning prior to Summer 2003)
B+	3.33	
B	3.0	
B-	2.67	
C+	2.5	(Law students beginning prior to Summer 2003)
C+	2.33	
C	2.0	
C-	1.67	
D+	1.33	
D	1.0	
D-	0.67	
F	0.0	
AU (Audit)	0.0	Not used in computation of GPA or enrollment status
DO (Dropped Out)*	0.0	Not used in computation of GPA
I (Incomplete)	0.0	Computed same as 'F'
IP (In Progress)	0.0	Not used in computation of GPA
N (No grade reported)	0.0	Computed same as 'F'
NA (Never Attended)*	0.0	Not used in computation of GPA
NC (No credit)	0.0	Not used in computation of GPA
NG (Not Graded)	0.0	Not used in computation of GPA
P (Pass)	0.0	Not used in computation of GPA
W (Withdrawn)	0.0	Not used in computation of GPA
WF (Withdrawn Failing)*	0.0	Computed same as 'F'
WP (Withdrawn Passing)*	0.0	Not used in computation of GPA

*Grade is no longer in use

PLACEHOLDER COURSES - Students participating in the National Student Exchange program, various consortium agreements, and various study abroad programs may be placed into courses designated by CIP, MSC, or NSE subject codes, respectively, for the purposes of enrollment verification and tuition payment. Following the term of enrollment, these courses will be graded "NG" (Not Graded). Actual coursework earned will be posted on the transcript in addition to the placeholder course.

RELEASE OF INFORMATION - The Family Educational Rights and Privacy Act of 1974 and later amendments prohibits release of information from this document to a third party without the student's written consent.

REPEATED COURSES - When courses are repeated, only the most recent attempt will count towards earned hours (with the exception of courses approved for repeatable credit). Grades for all attempts remain on the record and are computed in the student's GPA.

TRANSFER WORK - Transfer hours may be applied to degree programs and are computed in a student's overall GPA. All transfer courses listed on the transcript do not necessarily apply towards a degree program.

TRANSCRIPT VALIDATION – An official transcript is printed on secure paper, does not require a raised seal, and is valid only when it bears the signature of the registrar. Hold document up to the light to see the translucent watermark image. This transcript is printed on a crimson background. When photocopied in color, the word "VOID" will appear. A black and white transcript is NOT an original document.

Any questions regarding the validity of this transcript should be directed to: The University of Alabama, Office of the University Registrar, 206 Student Services Center, Box 870134, Tuscaloosa, AL 35487, (205) 348-2020, registrar@ua.edu.

DEPARTMENT OF THE ARMY
ARMY SUSTAINMENT UNIVERSITY
U.S. ARMY COMBINED ARMS SUPPORT COMMAND
562 QUARTERS ROAD
FORT GREGG-ADAMS, VIRGINIA 23801-2102

REPLY TO ATTENTION OF

July 18, 2023

Colonel Gregory K. Gibbons
562 Quarters Road
Fort Gregg-Adams, Virginia 23801

Dear Selection Board Members:

This letter serves to express my strongest recommendation for Captain Zach Smith in his application to serve as a judicial law clerk in your chambers. I am a Colonel in the United States Army, currently serving as the Commandant of Army Sustainment University on Fort Gregg-Adams. In over twenty-seven years of service, I have had the opportunity to observe and command hundreds of young Army officers, both in garrison environments and operational roles in combat theaters. Captain Smith's strong moral character, intellect, drive, and judgment make him one of the best young Army officers–whether inside or outside the Judge Advocate General's Corps—with whom I have had the pleasure of serving.

Captain Smith is currently my Military Justice Advisor. In practice, this means he provides legal support for all echelons at Army Sustainment University while also serving as a special staff officer on my staff. As the Commandant, I am the final decision authority for numerous personnel and military justice actions; as such, I need to be able to trust my legal advisor to deliver top-notch advice. When Captain Smith took over the role, he quickly worked to understand my preferences for receiving and evaluating information, and impeccably tailored his delivery of information to best enable me to make decisions efficiently and effectively.

A consummate professional, Captain Smith is always prepared with all relevant information to aid me in my decisions. He is careful to present the facts and governing rules in an unbiased way, so as not to influence my decision, but he is always ready to provide a well-reasoned opinion, when asked. While discussion remains open, Captain Smith is willing and able to stand his ground and push back respectfully when he disagrees. Just as importantly, though, once I have made a decision, he dutifully carries out the mission with all the precision expected from an officer in the United States Army.

Demonstrating competence and conscientiousness can often lead to being rewarded with more work as more and more people recognize you as someone who can simply "get things done." This has been true in spades for Captain Smith at Army Sustainment University–from the very beginning of his tenure, he has been consistently sought out on legal- and non-legal issues alike. Captain Smith has embraced this well-deserved reputation and even sought out additional responsibilities and challenges to help Army Sustainment University accomplish its mission.

He has my enthusiastic and unqualified recommendation. I consider myself fortunate to have officers like him on my team and I feel confident the same would be true for you, should Captain Smith decide to join your team. I can be contacted at gregory.k.gibbons.mil@army.mil or (804) 691-6768, should you wish to discuss this recommendation further.

Gregory K. Gibbons
Colonel, United States Army
Commandant, Army Sustainment University

August 05, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I write today to give my full support of Zachary Smith's application to serve as your law clerk. Zach is an excellent writer with strong analytical skills and an impeccable work ethic. His oral communication skills are also exceptional.

In his third year at the law school, Zach was a member of a moot court team that I coached. His team won the law school's first national championship at the Uvaldo Herrera National Moot Court Competition, hosted by the Hispanic National Bar Association. The moot court problem that year concerned the White House's authority to revoke press credentials and raised complicated First Amendment and due process issues. Zach played a leading role in drafting the team's brief. He was also instrumental in crafting the team's strategy and direction for oral arguments, which required the team to argue for both the petitioner and the respondent in alternating rounds. Beyond his academic contributions, Zach was the calm and steady force that held the team together and allowed it to reach its full potential. Zach had an uncanny ability to keep the team focused when they needed to work, but also to defuse tense situations with a subtle comment or act to create levity. His academic skill combined with the intangible benefits of his demeanor will make Zach an excellent clerk and a true asset in chambers.

Zach's overall performance in law school and in his early career are consistent with his performance on my moot court team. Zach was a strong student and has had immediate success in practice with the Army Judge Advocate General's Corps. Zach has already risen to be a Section Chief overseeing all federal litigation. Zach also has relevant clerking experience that makes him an excellent candidate to work in your chambers. He has served both as a legal intern for Judge Coogler in the United States District Court for the Northern District of Alabama and as a clerk at the House Committee on Oversight and Government Reform. A clerkship in your chambers would be a wonderful professional experience for Zach, and I know he would approach that opportunity with the same thoughtful intelligence that has garnered him so much success already. I hope you will give Zach's application serious consideration.

Sincerely,

Cameron W. Fogle

Cameron Fogle - cfogle@law.ua.edu

WRITING SAMPLE

I. BACKGROUND

A. FACTUAL BACKGROUND

There currently exists, in Bladensburg, Maryland, a forty-foot-tall concrete Latin cross (the "Memorial"). The cross bears the symbol of the American Legion[1] on both of its faces. The Memorial sits on the median at the intersection of Maryland Route 450 and U.S. Route 1—a median currently owned by Petitioner Maryland-National Capital Park and Planning Commission (the "Commission"). This is one of the county's busiest intersections, traversed by thousands of motorists daily. The Commission currently pays to maintain both the median and the Memorial.

In 1919, a group of private citizens set out to finance the construction of the Memorial. Their stated purpose was to honor the forty-nine residents of Prince George's County, Maryland who died in World War I. All donors to the project signed a pledge stating that they, "the citizens of Maryland, trusting in God, the Supreme Ruler of the universe, pledge faith in our brothers who gave their all in the World War to make the world safe for democracy." *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017). The pledge continued, "with our motto, 'one God, one country, and one flag,' we contribute this memorial cross commemorating the memory of those who have not died in vain." *Id.* The group of citizens held a groundbreaking ceremony on September 28, 1919, at which time the Town of Bladensburg owned the land on which the Memorial was to be built.

The group of citizens did not complete the project, however; they ran out of money and abandoned their efforts in 1922. At this time, the cross had been erected in its

[1] The American Legion is a war veterans' service organization aimed at advocating patriotism.

cruciform but remained unfinished. The Snyder-Farmer Post of the American Legion took over and successfully raised the necessary funds for the Memorial. The American Legion held a dedication ceremony on July 12, 1925. Christian chaplains—and no other religious leaders of any other faith—took part in the dedication ceremony. Representative Stephen Gambill of Maryland's Fifth Congressional District delivered the keynote address, in which he described the Memorial as "symbolic of Calvary."[2] The completed Memorial bore a plaque with the names of the forty-nine fallen Prince George's county residents, a quotation from Woodrow Wilson, and the inscription, "THIS MEMORIAL CROSS DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD." The base of the Memorial is inscribed with four words, one on each face: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION."

The Memorial stood alone as the only monument in the area for over 20 years. During this time, traffic in the area of the Memorial significantly increased, and in 1935 the Maryland state legislature "'authorized and directed' the State Roads Commission 'to investigate the ownership and possessory rights' of the area surrounding the Monument and to acquire the land 'by purchase or condemnation.'" *Am. Humanist Ass'n v. Maryland-Nat. Capital Park* 147 F. Supp. 3d 373, 378 (D. Md. 2015). Starting in the 1940s, additional monuments honoring veterans were built near the Memorial, in what is now known as "Veterans Memorial Park." Despite some dispute between the parties as to the state of the title for the plot of land and the Memorial, the record is clear that Petitioner acquired ownership of the Memorial and the median in March 1961. Petitioner has spent at least $117,000 on maintenance of the Memorial. In 2008, Petitioner set aside an additional $100,000 for future renovations and maintenance of the Memorial (though only $5,000 of

[2] The anglicized name for the site of Jesus's crucifixion. *Am. Humanist Ass'n*, 874 F.3d at 200 n.2.

this had been spent as of 2015). On February 25, 2014, Respondents brought a claim against Petitioners under 42 U.S.C. § 1983, alleging a violation of the Establishment Clause.

B. PROCEDURAL HISTORY

Maryland residents Steven Lowe, Fred Edwords, and Bishop McNeill, along with the American Humanist Association, brought suit in the United States District Court for the District of Maryland against the Maryland-National Capital Park and Planning Commission under 42 U.S.C. § 1983, alleging a violation of the Establishment Clause of the First Amendment. The United States District Court for the District of Maryland granted summary judgment in favor of Defendant Maryland-National Capital Park and Planning Commission and Intervenor-Defendants American Legion, holding that government ownership and maintenance of the cross and surrounding land passed the three-prong test articulated by this court in *Lemon v. Kurtzman*. The Court of Appeals for the Fourth Circuit reversed and remanded to the United States District Court for the District of Maryland, holding that the test from *Van Orden v. Perry* was the proper test to apply in this case. *En banc* rehearing in the Fourth Circuit was requested and denied. Thereafter, Maryland-National Capital Park and Planning Commission petitioned for *writ of certiorari*, which this Court granted.

II. A BRIEF HISTORY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

This Court articulated a test for evaluating Establishment Clause claims in *Lemon.* In order to clarify Establishment Clause law, a single, clear test should be applied in all relevant cases. *Lemon* is the right tool for the job. The *Lemon* test is applicable in display cases like the one at bar for the reasons outlined below.

The Establishment Clause of the First Amendment commands that "Congress shall make no law respecting an establishment of religion . . . ." These ten words are simple enough on their face—no long walk down the garden path, here. In theory, then, their

application should be likewise simple. In theory, practice and theory are the same, but in practice, they rarely are: It can fairly be said that there exists a morass of confusion surrounding the application of the Establishment Clause in practice. This is due in no small part to what—at times—has been an inconsistent or seemingly irreconcilable series of decisions issued by this Court. This case presents an opportunity for us to clear up this confusion and to set the record straight: *Lemon* is the law of the land in Establishment Clause display cases and will be applied here.

The text of the Establishment Clause is, as Chief Justice Berger puts it in his *Lemon v. Kurtzman* majority opinion, "at best opaque, particularly when compared with other portions of the Amendment." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). We are thus faced with the onerous task of interpreting this opaque language and articulating a more transparent standard that can be readily understood by the lower courts across this great nation. No easy feat to be sure, but it is our cross to bear. We endeavor today to set the record straight and to clarify this Court's Establishment Clause jurisprudence: The decision in *Van Orden v. Perry* is, in part, anomalous and the precepts articulated by this Court in *Lemon* are applicable in the instant case. *Van Orden v. Perry*, 545 U.S. 677 (2005); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A. THE JEFFERSONIAN WALL

Everson v. Board of Education marked the beginning of this Court's modern, twentieth-century Establishment Clause jurisprudence. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Prior to *Everson*, the First Amendment was not incorporated to the states, and as such, many states had laws granting benefits to certain religious groups or placing limitations on others. The decision in *Everson* incorporated the protections of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment. Also, in *Everson*, this Court invoked the Jeffersonian ideal of the "wall of separation

between church and State" in the Establishment Clause context. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

The form and extent of the Jeffersonian wall were fleshed out in the years following the *Everson* decision. By the time *Lemon v. Kurtzman* was decided by this Court, though, the "wall" of separation between church and State had become a "blurred, indistinct, and variable barrier depending on all the circumstances of the particular relationship." *Lemon,* at 614. Today, the "touchstone" of our Establishment Clause analysis is the requirement of "governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty. v. ACLU,* 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). As this Court has noted before, a blind loyalty to "neutrality" or "separation," though, can result, in an unconstitutional hostility to religion. *Van Orden v. Perry,* 545 U.S. 677, 699 (2005). The test articulated in *Lemon* is the appropriate tool for striking the appropriate balance in Establishment Clause challenges like the one currently before this Court.

As this Court held in *Lemon*, "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." *Lemon,* at 612 (1971). These cumulative criteria have been encapsulated by the *Lemon* test: First, the government action must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the government action must not foster an excessive government entanglement with religion. *Id.*

Explicit application of the *Lemon* test has not been seen in every Establishment Clause case—this Court has noted its "unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). In the decisions of the last thirty years, though, echoes of *Lemon* can be found in many of this Court's decisions in the Establishment Clause realm. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 308 (2000) (holding that a reasonable observer of the prayers before

football games would interpret them as being sanctioned by the school); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (discussing context to determine the meaning of displays). That is, even when the *Lemon* test has not been explicitly applied, this Court still considered similar factors such as the context of the government action, the substance of the government action, and the effect that the government action would have on a reasonable observer. We aren't comparing apples and oranges here—let's call a lemon a lemon. Rather than claiming to apply new tests that are only nominally different than *Lemon*, this Court will directly apply *Lemon* in this and future Establishment Clause display cases.

B. THE *VAN ORDEN* DECISION

One fateful day in 2005, this Court handed down decisions in two separate—albeit fairly similar—Establishment Clause cases: *Van Orden v. Perry* and *McCreary County v. ACLU*. Both cases dealt with the presence of the Ten Commandments on public property, and yet this Court reached two diametrically opposed results.

In *Van Orden*, this Court evaluated a monument on the grounds of the Texas state capitol building that featured the text of the Ten Commandments. *Van Orden v. Perry*, 545 U.S. 677 (2005). The monument sat among 17 other monuments and 21 historical markers, in a large park. *Id.* at 701. The Fraternal Order of Eagles paid for the construction of the monument, but the state was thereafter responsible for its maintenance. *Id.* This Court held that the display of a monument featuring the Ten Commandments—a clear example of a religious text—still conveyed a predominantly secular message because of its situation among other monuments to Texan values, the prominent featuring of the Fraternal Order of Eagles' logo on the monument, and the desire of Fraternal Order to "highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.*

A plurality of the *Van Orden* Court decided the Lemon test is "not useful" in the

"passive" monument context. *Id.* at 686. What the plurality did not do, however, was explain *why*. Fortunately, this puzzling proclamation is of little moment here, because Justice Breyer's controlling concurrence acknowledged the role that *Lemon* continues to play in our Establishment Clause jurisprudence. Furthermore, the bulk of Justice Breyer's analysis focuses on inquiries closely aligned with the goals of the "effect" prong of the *Lemon* test (e.g., the context of the display, its placement and physical setting, etc.). Despite the language in *Van Orden* disavowing the *Lemon* test, much of the reasoning employed by this Court in *Van Orden* is indeed in line with the ethos of *Lemon*. Although *Van Orden* may have muddied the waters somewhat, it properly considered the three prongs that make up the *Lemon* analysis. In sum, the inquiries in *Van Orden* (into context of the display and its placement, etc.) should not be seen as working at cross-purposes with a thorough *Lemon* analysis. Rather, the bulk of the *Van Orden* consideration should be viewed as component parts of the overall inquiry guided by the tripartite *Lemon* test, which is indeed useful in the instant case.

III. A TWENTY-FIRST CENTURY *LEMON*

Based on the application of the *Lemon* test in this Court's past decisions, it seems that the test has evolved from its initial formulation. All this Court's decisions in the Establishment Clause area have sought to give effect to the purpose of the First Amendment but have varied in terms of the best approach to achieve this aim. Though this not the first time, and likely not the last, today we seek to clarify the overarching Establishment Clause doctrine of this Court. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., Concurring). The following is an application of the *Lemon* test, as it relates to this case.

A. PURPOSE

Lemon's first prong originally purported to invalidate all government action whose purpose was not secular. What this Court has applied in recent decisions, though, is almost

the inverse of the first prong as articulated in *Lemon*: "whether the sole purpose of a law is to advance religion," or whether its "pre-eminent purpose . . . is plainly religious in nature." *Edwards v. Aguillard*, 482 U.S. 578, 590 (1987); *Stone v. Graham*, 449 U.S. 39, 41 (1980). When government acts with a partly secular and partly sectarian purpose, this prong is not necessarily violated. The inquiry into the purpose of the challenged government action in Establishment clause cases is intentionally "deferential and limited" because this Court does not have "license to psychoanalyze legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring). The operative question is whether the government intends, through its action, to endorse or disapprove of a particular religion or nonreligion. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

The purpose of the Memorial can be described as mixed. The original stated purpose of the Memorial was secular: to honor those residents of Prince George's County whose lives were lost in World War I. The pledge signed by all those involved in the initial commissioning of the Memorial, though, certainly had sectarian threads running through it: "with our motto, 'one God, one country, and one flag,' we contribute this memorial cross commemorating the memory of those who have not died in vain." *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017) (J.A. 1168).

Because the government did not, in this case, direct or oversee the commissioning of the Memorial, it is more instructive look to the governmental purpose in acquiring the Memorial. The governmental purpose was wholly secular: the government sought to gain ownership of the parcel of land housing the cross because of the increased traffic flow in the area and the need for governmental oversight there. The government did not intend, through its acquisition of the Memorial and the lands upon which it is situated, to either endorse Christianity or disapprove of other, non-Christian religions (or non-religions). The Memorial thus passes the first prong of *Lemon* unscathed.

B. EFFECT

The second *Lemon* prong—the "effect prong"—has been widened in scope since its inception. *See, e.g., Van Orden*, at 677 (inquiring into the context of the challenged display). In *Van Orden*, the Court discussed the context and historical significance of the challenged display at length. This Court has also reasoned that the effect of a display could—and should—be gauged by its effect on a well-informed, reasonable observer. *McCreary Cty*, 545 U.S. at 862; *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). This second prong evaluates the effect of the challenged government action and can properly include some of the factors discussed in *Van Orden* (e.g., historical message, context, physical setting of the display).

The Petitioner argues that the long history of the use of the Latin cross in the context of memorials honoring the dead effectively changed the meaning of the symbol—or at the very least gave it a second, secular meaning.[3] Because of this new, predominately secular meaning, so the argument goes, the Bladensburg cross does not have the primary effect of endorsing religion. Whether or not the premise is true, this argument is due to fail: to give credence to this argument would be to short-circuit the second *Lemon* prong.

This Court does look to historical significance to derive the meaning of a display. *See, e.g., Van Orden* at 677. This is not to say, however, that displays violative of the Establishment Clause can be "grandfathered in" by virtue of standing unchallenged for some indeterminate period of time. The proposition that continued, unchallenged use of a religious display throughout history establishes a separate, secular meaning is suspect: It cannot be said that "the longer the violation, the less violative it becomes," and the overreliance on historical significance urged by the Petitioner would achieve just such a

[3] Such an argument strains credulity: if this were so, the thousands of Christians electing to wearing jewelry or clothing featuring the Latin cross in acknowledgement of their faith could be mistaken, at times, to be paying homage to the fallen soldiers of WWI with their choice of jewelry or clothing. As far as this Court has experienced, no such mistake has ever been made.

result. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 208 (4th Cir. 2017) (quoting *Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1422 (7th Cir. 1993)). Thus, the "elapsed time unchallenged" factor of *Van Orden* is overruled.

At the time of the Memorial's construction, its stated purpose was to honor the fallen soldiers of World War I hailing from Prince George's County, Maryland. At least facially, this is a permissible, secular purpose. The analysis does not end here, however. The principal or primary effect of the Memorial can—and should—be determined with a look to a well-informed, reasonable observer. A well-informed, reasonable observer would see the Memorial, standing alone in the median and know that it is owned and maintained by the government. This observer would know that this Latin cross was used to memorialize fallen soldiers of the first World War, regardless of their individual religious predilections. The observer would know the Latin cross to be the preeminent symbol of Christianity, a symbol that is used in the Christian tradition to memorialize the dead. The effect of use—by the government—of a Latin cross to memorialize the dead is an implication that the government views this as the proper way to memorialize the dead, to the exclusion of other methods that might be employed by other religions or nonreligions. The primary or principal effect of the Memorial is endorsement of a Christian tradition to the exclusion of other religious or nonreligious traditions, in violation of the Establishment Clause.

Petitioners and several *amici* have expressed fear that if this Court were to hold that the Bladensburg cross is violative of the Establishment Clause that many other Latin crosses on government property—such as those in Arlington Cemetery—would be torn down in droves. The crosses marking graves of fallen servicemembers in military cemeteries are an example of the kind of government neutrality towards religion that is perfectly permissible under the Establishment Clause. The government is not required to be completely hostile to religion and may therefore permit individuals to exercise their own chosen religion (or nonreligion) in deciding how to honor their family members who have

passed away (in this case by electing to mark graves with a Latin cross).

The Bladensburg cross, though, is different. A Maryland state entity now owns a forty-foot-tall concrete cross, the stated purpose of which is to memorialize fallen soldiers of World War I. Were the memorial instead a Latin cross honoring victims slain in a terrorist attack on a Christian church—or a Star of David honoring victims slain in a terrorist attack on a synagogue, the analysis would likely be different. A Latin cross, of course, a perfectly common and proper way to memorialize the dead (in the Christian tradition), but "it only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ." *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 207 (4th Cir. 2017). The message that the state of Maryland is sending to well-informed, reasonable observers with this memorial is that the proper way to memorialize the dead—regardless of their individual religious views—is with the use of a Latin cross. Such a suggestion from the government necessarily endorses the religious practices of one group to the exclusion of the religious (or nonreligious) practices of other groups. The difference between the crosses on grave markers in Arlington and the cross at issue in Bladensburg may be slight, but it is an operative distinction, nonetheless.

C. EXCESSIVE ENTANGLEMENT

The third prong—or "excessive entanglement prong"—is perhaps more nuanced. "Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon*, *see, e.g.*, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 (1973); *Lemon v. Kurtzman*, supra, at 623, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). The proper inquiry under the third prong of *Lemon* is into whether there is excessive *institutional* entanglement between government and religion. *Id.*

This inquiry is one of both degree and of kind, making it difficult, at times, to identify a violation. Evidence of the use of public funds is one factor, but it is not necessary for a finding of excessive entanglement. However, "any use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring).

In this case, the Commission has spent at least $117,000 to maintain the Memorial. Even *de minimis* spending of public funds to promote religious doctrine would be impermissible, but the Commission has spent and allocated nearly $250,000 to the maintenance of a Latin cross, which only holds value as a symbol of death and resurrection because the "crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Carpenter v. City and Cty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996). The ongoing ownership and maintenance of the Memorial has resulted in excessive entanglement.

IV. DISPOSITION

The Establishment Clause and its proscription against government endorsement of religion does not require the purge of all things religious from the public sphere. *Van Orden,* at 699. In fact, to require such a purge would "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* That a government-owned display takes the shape of a Latin cross does not mean, necessarily, that the Establishment Clause of the First Amendment is violated.

The Memorial at issue, however, does not pass the second or third prongs of the *Lemon* test. The primary effect of the Memorial is to endorse the Christian practice of honoring the dead with use of a Latin cross, necessarily to the exclusion of similar practices among other religious or nonreligious groups. The ongoing funding of the Memorial with public funds creates an excessive institutional entanglement with religion.

The decision below is thus AFFIRMED.

Applicant Details

First Name	**Will**
Last Name	**Starks**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **8200 Southwestern Boulevard, APT 904** **City** **Dallas** **State/Territory** **Texas** **Zip** **75206** **Country** **United States**
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Applicant Education

BA/BS From	**University of Tennessee-Knoxville**
Date of BA/BS	**July 2021**
JD/LLB From	**Southern Methodist University Dedman School of Law** **https://www.smu.edu/Law/Career-Services**
Date of JD/LLB	**May 3, 2024**
Class Rank	**Below 50%**
Law Review/Journal	**Yes**
Journal(s)	**SMU Science & Technology law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Saul Lefkowitz Moot Court Competition** **Jackson Walker Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

WILLIAM L. STARKS
2876 Mountain Pointe Dr NW | Cleveland, TN 37312 | 423-242-3131 | wstarks@smu.edu

August 2, 2023

The Honorable Kimberly A. Swank
United States Courthouse
201 South Evans St.
Greenville, NC 27858

Dear Judge Swank:

I am a rising third-year student at SMU Dedman School of Law and a Senior Articles Editor on the SMU Science and Technology Law Review. I am writing to apply for the one-year clerkship position in your chambers to begin in 2024. I am drawn to a career in the public sector, and I'm inspired by your commitment to public service. Working with you would give me the opportunity to serve the people while diving deeper into my legal interests.

My previous experiences with the Court of Appeals for the Sixth District of Texas, U.S. District Court for the Northern District of Texas, and the Department of Labor's Dallas Office will make me a strong addition to your chambers. During my time at the Court of Appeals for the Sixth District of Texas, I wrote memoranda and discussed cases with court attorneys and justices ranging from contract law, to criminal law, and criminal procedure. I attended weekly motions conferences with the three justices of the Court and helped prepare the justices for oral argument regarding a jury deliberation case. I am eager to transfer these skills to the federal judiciary while deepening my understanding of the judicial system. I built upon my state court experience through SMU's Federal Judicial Externship Course taught by Senior District Judge A. Joe Fish of the U.S. District Court for the Northern District of Texas while also externing in his chambers. Through this experience I acquired the knowledge, skills, and values about the judicial system and judicial deliberation process that will make me an effective, chambers-ready, law clerk. Additionally, I attended and helped attorneys prepare for OSHA and MSHA trials, drafted discovery motions, drafted memoranda, and attended depositions while working for the Department of Labor.

I believe these experiences, along with my legal writing and research courses, have prepared me to contribute meaningfully to your chambers. I appreciate you taking the time to consider my application. I look forward to hearing from you.

Sincerely,

William Starks

William L. Starks

WILLIAM L. STARKS

8200 Southwestern Boulevard | Dallas, TX 75206 | 423-242-3131 | wstarks@smu.edu

EDUCATION

SMU Dedman School of Law Dallas, TX

Candidate for Juris Doctor, May 2024

- Fall 2022 GPA: 3.640; Cumulative GPA: 3.214
- Science and Technology Law Review - *Senior Articles Editor; Antitrust & Big Tech Symposium Board Member*
- Labor and Employment Law Association
- American Constitution Society
- Dallas Bar Association, *Student Member*
- *Best Advocate in Round*, Jackson Walker Moot Court Competition
- Saul Lefkowitz Moot Court Competition
- Wilson W. Herndon Memorial Antitrust Award
- Pro Bono Honor Roll
- Dean's Scholarship

The University of Tennessee, Knoxville Knoxville, TN

Bachelor of Science, *cum laude*, in Sport Management, July 2021

- GPA: 3.5
- Minor: Business Administration
- Partners in Sport

WORK EXPERIENCE

The Honorable Amos L. Mazzant, III, U.S. District Court for the Eastern District of Texas Sherman, TX

Judicial Intern, June 2023 – August 2023

The Honorable E. Trenton Brown, III, Court of Appeals of the State of Georgia Atlanta, GA

Judicial Intern, May 2023 – June 2023

The Honorable A. Joe Fish, U.S. District Court for the Northern District of Texas Dallas, TX

Judicial Extern, January 2023 – April 2023

- Researched and wrote motions to dismiss regarding ERISA & Texas state law
- Attended many hearings including pretrial, sentencing, detention, voir dire, etc.
- Assisted with the preparation of a bench book
- Attended an eight-week course explaining the inner workings of the judicial system including the ethical obligations of a law clerk

U.S. Department of Labor Dallas, TX

Dallas RSOL Intern, July 2022 – August 2022

- Conducted research and writing related to providing legal advice to client agencies, trial litigation matters, and rulemaking projects for client agencies
- Analyzed the legal impact of legislative developments, administrative and court decisions, rulings, and opinions
- Attended litigation-related activities, such as depositions, trial preparation activities, and trials
- Drafted discovery, motions, and responses to discovery requests, and analyses
- Legal work mainly included OSHA and MSHA litigation

Court of Appeals for the Sixth District of Texas Texarkana, TX

Judicial Intern, May 2022 – June 2022

- Researched and wrote memoranda on issues ranging from contract disputes to criminal procedure
- Worked with Court attorneys to review legal opinions
- Attended Oral Argument on case involving jury deliberations

Shaw Industries Calhoun, GA

Marketing Intern, May 2021 – August 2021

INTERESTS

Interests include community involvement, all things Vol sports, golf (attempting to break 100), piano (novice), and reading non-fiction.

Unofficial Transcript

Name: Starks,William Lance
Student ID: 48588129
SSN: XXX-XX-1438
DOB: 04/16/XXXX

Print Date: 2023/06/05

----- Academic Program History -----

Program: Law - Juris Doctor
2021/06/28: Active in Program

----- Beginning of Law Record -----

Fall 2021 (2021/08/16 - 2021/12/10)

Course		Description	Attempted	Earned	Grade	Points
LAW	6365	Legislation and Regulation	3.00	3.00	B	9.000
LAW	6367	Contracts I	3.00	3.00	B	9.000
LAW	6403	Torts	4.00	4.00	B+	13.200
LAW	8341	Criminal Law	3.00	3.00	B	9.000
LAW	8375	LRWA I	3.00	3.00	A	12.000
		Term GPA : 3.262 Term Totals :	16.00	16.00		52.200
Cum GPA		3.262 Cum Totals	16.00	16.000		52.200

Spring 2022 (2022/01/06 - 2022/05/06)

Course		Description	Attempted	Earned	Grade	Points
LAW	6264	Contracts II	2.00	2.00	B-	5.400
LAW	6366	Constitutional Law I	3.00	3.00	B-	8.100
LAW	6404	Property	4.00	4.00	C+	9.200
LAW	6405	Civil Procedure	4.00	4.00	B	12.000
LAW	8376	LRWA II	3.00	3.00	C	6.000
		Term GPA : 2.543 Term Totals :	16.00	16.00		40.700
Cum GPA		2.903 Cum Totals	32.00	32.000		92.900

Fall 2022 (2022/08/15 - 2022/12/09)

Beginning with Fall 2022, we included an A+ in our grading scale.

Course		Description	Attempted	Earned	Grade	Points
LAW	6231	Int'l Oil and Gas Negotiations	2.00	2.00	B+	6.600
LAW	6349	Federal Courts	3.00	3.00	A	12.000
LAW	6360	Labor Law	3.00	3.00	B+	9.900
LAW	6420	Business Enterprise	4.00	4.00	B+	13.200
LAW	7388	Antitrust Law	3.00	3.00	A+	12.900
LAW	8050	Public Service Requirement	0.00	0.00	P	0.000
		Term GPA : 3.640 Term Totals :	15.00	15.00		54.600
Cum GPA		3.138 Cum Totals	47.00	47.000		147.500

Spring 2023 (2023/01/05 - 2023/05/05)

Course		Description	Attempted	Earned	Grade	Points
LAW	6160	Adv Legal Writing/Editing	1.00	1.00	A	4.000
LAW	7212	Selected Topics in Labor Law	2.00	2.00	A-	7.400
LAW	8137	Federal Judicial Externship	1.00	1.00	P	0.000
LAW	8201	Legal Externship	2.00	0.00		0.000
LAW	8311	Constitutional Law II	3.00	3.00	A-	11.100
LAW	8455	Evidence	4.00	4.00	B+	13.200
		Term GPA : 3.570 Term Totals :	13.00	11.00		35.700
Cum GPA		3.214 Cum Totals	60.00	58.000		183.200

Fall 2023 (2023/08/14 - 2023/12/08)

Course		Description	Attempted	Earned	Grade	Points
LAW	6216	Corporate Counsel Extern Prog.	2.00	0.00		0.000
LAW	6244	Trade Secrets & Bus. Torts	2.00	0.00		0.000
LAW	7329	Jurisprudence I	3.00	0.00		0.000
LAW	7350	Professional Responsibility	3.00	0.00		0.000
LAW	7363	Income and Wealth Inequality	3.00	0.00		0.000
LAW	8201	Legal Externship	2.00	0.00		0.000
		Term GPA : 0.000 Term Totals :	15.00	0.00		0.000
Cum GPA		3.214 Cum Totals	75.00	58.000		183.200

Law Career Totals

Cum GPA:		3.214 Cum Totals	75.00	58.00		183.200

----- End of Unofficial Transcript -----

COURT OF APPEALS

State of Texas

Sixth Appellate District

Bi-State Justice Building
100 North State Line Avenue #20
Texarkana, Texas 75501

CHIEF JUSTICE
SCOTT E. STEVENS

JUSTICES
JEFF RAMBIN
CHARLES VAN CLEEF

Court of Appeals
Sixth Appellate District
State of Texas

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BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75501
903/798-3046

June 5, 2023

RE: Letter of Recommendation In Support of William Starks

To Whom It May Concern:

As a Justice serving the Texas Sixth Court of Appeals, I believe I am uniquely qualified to recognize talent that can contribute to court staff. Today, I am writing to express my support for William Starks's application for the position of Law Clerk to your honorable Court.

In 2022, William arrived with optimism at our Court as a judicial intern and made a good impression on everyone in a short period of time. William was given several responsibilities, including performing legal research, writing legal memoranda, and participating in conferences with the Justices and staff attorneys. He was quick to learn about the inner workings of our Court and was able to grasp challenging legal concepts, even as a law student.

During the time William interned with us, he was just beginning to grasp the fundamentals of effective legal writing. To improve his legal writing, the Court instructed him to draft a Moot Court Appellate Brief. William submitted a well-written brief that showcased his legal writing. Even though William produced a good work product, he wished to improve it. William was very receptive to constructive feedback and, on his own, made valuable improvements to the brief.

William was also a pleasure to work with. He had a delightfully positive attitude and was eager to stick to tight deadlines. I am confident that William will be a productive addition to your Court. If you require further information regarding William and examples of his work, please do not hesitate to contact me at (903) 798-3046, or by email at charles.vancleef@txcourts.gov.

Sincerely,

Charles van Cleef
Justice, Place 3
Court of Appeals, Sixth Appellate District of Texas

SMU | DEDMAN SCHOOL OF LAW

April 4, 2023

Dear Judge:

RE: Application of Will Starks

I write to support the application of Will Starks to be a judicial clerk for you. Will was a student in my Federal Courts class here at the SMU Dedman School of Law.

On the basis of my knowledge of Will Stark's work and his character, I give him my highest recommendation. Will was an excellent student in my Federal Courts class -- he received an A. Will offered many thoughtful comments during class discussion. Will's performance on the exam shows that he is capable of first rate legal analysis. Will has also been active in many significant law school activities, including the Science and Technology Law Review and the American Constitution Society. Will also has important work experience as a judicial extern/intern.

Given all of this, I believe that Will would make an outstanding judicial clerk. I strongly urge you to hire Will Starks as your judicial clerk.

Sincerely,

George A. Martinez

George A. Martinez
Professor of Law

Dedman School of Law
PO Box 750116 Dallas TX 75275-0116

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MYANMAR

ALLIANCES IN MEXICO
AND SRI LANKA

August 1, 2023

To Whom It May Concern:

I am pleased to recommend Will Starks, who is applying for a clerkship in your chambers. My recommendation is without qualification—he would be an excellent clerk for you.

As you can see from his resume, Will has excelled academically in college and now in law school. He was a student in my Antitrust class at SMU (I was a visiting faculty member there last fall), where I was able to observe and evaluate his communication and legal skills. He was an active and well-prepared participant in the class and received the highest final grade (an "A+"). As a result of his performance in my class, he received the Wilson H. Herndon Memorial Antitrust Award.

Please give Will every consideration. His academic record, excellent experience (which includes judicial internships in both the state and federal systems), and engaging personality would make him an ideal candidate for your chambers. If you need any additional information from me about him, please contact me at your convenience by email at rdgordon@duanemorris.com.

Very truly yours,

Randy D. Gordon
Managing Partner—Dallas and Fort Worth Offices
Duane Morris LLP

Executive Professor
Texas A&M University School of Law

DUANE MORRIS LLP
100 CRESCENT COURT, SUITE 1200, DALLAS, TX 75201 PHONE: +1 214 257 7200 FAX: +1 214 257 7201

WILLIAM L. STARKS

8200 Southwestern Boulevard | Dallas, TX 75206 | 423-242-3131 | wstarks@smu.edu

This writing sample is an excerpt from my Saul Lefkowitz Moot Court Competition Brief. The Saul Lefkowitz Moot Court Competition is an annual event honoring Saul Lefkowitz, whose distinguished career was dedicated to the development of trademark and unfair competition law. The Competition introduces law students to important issues arising in U.S. trademark and unfair competition law. This sample presents the initial section of the argument, focusing on the likelihood of consumer confusion between two marks. I'm happy to provide the full brief upon request.

I. THE DISTRICT COURT INCORRECTLY RULED THAT A LIKELIHOOD OF CONFUSION DOES NOT EXIST BETWEEN REX'S MARK AND BTX'S MARK.

This Court must reverse the district court's erroneous ruling because the totality of the factors show that BTX's use of Rex's federally registered trademark is likely to cause consumer confusion as to the source of the mark, thus there is likelihood of confusion and trademark infringement occurred. Likelihood of confusion, the core of a trademark infringement claim, occurs when a defendant's use of a junior trademark is likely to cause confusion among consumers with a plaintiff's senior trademark. *See* 15 U.S.C. § 1114(1). The key inquiry for a court reviewing likelihood of confusion is whether a consumer is likely to be confused as to the source of the goods or services bearing the mark at issue in the case. *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012). Each circuit has its own set of non-exclusive factors, born out of the first restatement of torts, to help determine whether confusion is likely. *See Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991); *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 478 (5th Cir. 2008); Restatement (First) of Torts § 731 (1938). In weighing the individual factors, "[n]o single factor is dispositive, and a finding of a likelihood of confusion need not be supported by a majority of the factors." *Smack Apparel Co.*, 550 F.3d at 478; *Homeowners Grp.*, 931 F.2d at 1107 ("These factors imply no mathematical precision, but are simply a guide"). The Utopia District Court analyzed seven factors in determining whether there was a likelihood of confusion, which are:

(i) The resemblance of the two marks in terms of sight, sound, and meaning;
(ii) The relationship between the goods or services of the parties;
(iii) The relationship between the parties' trade channels;
(iv) The strength, both inherent and acquired, of the Plaintiff's mark;
(v) Any evidence of actual confusion, or valid surveys. . .;
(vi) An intent . . . to derive benefit from the original mark's success; and

> (vii) Any other factor recognized . . . as probative of likelihood of confusion.
>
> C.R. 9, Conclusions of Law ¶ E.

Additionally, nearly every circuit analyzes the sophistication of the purchasers. *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487 (1st Cir. 1981) ("the classes of prospective purchasers"); *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) ("sophistication of consumers in the relevant market"); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983) ("the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase"). In analyzing these factors, this Court should keep in mind that "[n]ot all of the . . . factors may be relevant or of equal weight in a given case, and any one of the factors may control a particular case." *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003) (internal quotations omitted).

Further, Rex must merely show a likelihood of confusion by preponderance of evidence that an appreciable number of purchasers are likely to be confused, *not a majority* of purchasers. *See Savin Corp. v. Savin Grp.*, 391 F.3d 439, 456 (2d Cir. 2004) (emphasis added). This Court should reverse the district court's ruling because (1) the marks are similar; (2) the goods and services are intertwined; (3) they share similar trade & marketing channels; (4) Rex's federally registered trademark is strong; and (5) the relevant market's consumers are unsophisticated. Thus, there is likelihood of confusion.

A. The Similarity of The Marks Is Stark When Viewed in Their Dominant Parts.

The district court incorrectly ruled that the similarity between the marks factor favored BTX because the district court focused on peripheral sections of the mark. In analyzing similarity of appearance, courts look at the total effect of the designation, rather than on a comparison of individual features. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980); *see*

Jet, Inc. v. Sewage Aeration Sys., 165 F.3d 419, 424 (6th Cir. 1999) ("the impression made by the marks as a whole"). However, while the court must view the mark as a whole, the "dominant" part of the mark should carry more weight than the minor additions. *See A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 216 (3d Cir. 2000); *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 228 (5th Cir. 2009) ("[C]ourts should give more attention to the dominant features."). For Example, when changes to the mark do not involve the dominant section, courts have found a likelihood of confusion. *See Morningside Group Ltd. v. Morningside Capital Group, L.L.C.*, 182 F.3d 133, 140 (2d Cir. 1999) (Likelihood of confusion between "The Morningside Group Limited" and "Morningside Capital Group, L.L.C."); *Daddy's Junky Music Stores, Inc.*, 109 F.3d at 283 ("the phrase 'Daddy's' is not merely a component of the 'Daddy's' marks: it is the marks.").

Further, the addition of the junior user's name to the senior user's mark does not reduce the likelihood of confusion. *W. E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 662 (2d Cir. 1970) (Revlon's use of its own name mark REVLON with the senior user's CUTE-TRIM trademark did not prevent a likelihood of confusion, "to couple the benefits of the 'Trim' mark with the persuasive powers of its own name, and thus the tactic could not ensure against, but might indeed promote, confusion."). All the above serve to guide a court in the main thrust of a trademark infringement claim, determining if consumers will be confused as to a mark's source, therefore, courts often favor the similarity of the mark as "the single most important factor". *A & H Sportswear, Inc.*, 237 F.3d at 216.

Here, the marks are confusingly similar because BTX's mark uses Rex's mark in dominant part. Additionally, the changes made to Rex's mark were either peripheral or the addition of BTX's name, neither of which are dispositive toward a likelihood of confusion. *See* C.R. 7, Findings of

Fact ¶ 22; *see W. E. Bassett Co.,* 435 F.2d at 662. Like the *Revlon* case, BTX's addition of their name is not an argument against likelihood of confusion, and if anything would "promote confusion". *Id.* The addition of "WE'RE" to the front of Rex's mark is irrelevant to the likelihood of confusion analysis as it is merely peripheral to the dominant section of the mark. *See* C.R. 7, Findings of Fact ¶ 22; *see In re Thor Tech, Inc.*, 90 U.S.P.Q.2d 1634, 2009 WL 1098997, at *2 (T.T.A.B. 2009) ("The addition of the word 'The' at the beginning of the registered mark does not have any trademark significance."). Therefore, the weight of the evidence overwhelmingly establishes that BTX's tagline is starkly similar, in dominant part, to Rex's registered trademark, and this Court should give this factor major consideration due to its relationship to the overall goal of source confusion in trademark infringement cases.

B. The Relationship Between The Goods Or Services Factor Weighs In Favor Of Rex Because The Marks Use In A Closely Related Music Market Would Lead Consumers To Believe That The Goods Come From The Same Source.

The district court properly ruled that the relationship between the goods or services factor weighs in favor of Rex because both parties' goods and services are so intertwined with the music market that consumers would believe that one entity produced both. The more closely the goods or services are related the more likely consumers will be confused. *See Rearden LLC.*, 683 F.3d at 1212. The key inquiry is not whether the goods or services can be distinguished from each other in some aspect, but instead the issue is whether consumers would believe that one entity produced both. *PlayNation Play Sys., Inc. v. Velex Corp.*, 924 F.3d 1159, 1168 (11th Cir. 2019). This factor, although important, "it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion." *7–Eleven Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715, 1724 (T.T.A.B.2007).

The Court in *AWGI, LLC* held that the parties' goods or services were related because they were engaged in the same industry and served common customers. *AWGI, LLC v. Atlas Trucking Co., LLC*, 998 F.3d 258, 266 (6th Cir. 2021). The Court held that "at a minimum" the goods or services overlapped and that customers would believe that such goods or services came from the same source. *Id.* On the other hand, the Court in *Checkpoint* held that consumer confusion would be unlikely because although the goods are in the same industry, they "operate in distinct niches". *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 287-88 (3d Cir. 2001).

Here, Rex and BTX are in a closely related music market competing for the same target demographic and dollars. *See* C.R. 5, Findings of Fact ¶ 15; *see* C.R. 6, Findings of Fact ¶ 19; *see AWGI, LLC*, 998 F.3d at 266. Further, the goods and services are so related to the point that customers looking for music could fulfill their needs by buying from one instead of the other. *See C*.R. 4, Findings of Fact ¶ 8; *see Daddy's Junky Music Stores, Inc.*, 109 F.3d at 283. Unlike in *Checkpoint*, Rex and BTX do not operate in "distinct niches" within the music industry, on the contrary, they both sell the same product (music) to the same demographic (young people). *See* C.R. 5, Findings of Fact ¶ 15; *see* C.R. 9, Findings of Fact ¶ 19; *see Checkpoint Sys.*, 269 F.3d at 287–88. Given the above, this Court should not only follow the district court's ruling that Rex and BTX's goods and services are related due to the overlap in customers and industry, but also weigh this factor heavily in its determination of whether a likelihood of confusion exists.

C. The Relationship Between The Parties' Trade Channels Factor Should Favor Rex.

The district court erred in finding the trade channel factor weighed in favor of BTX because Rex and BTX share trade channels. The trade channels factor can only favor BTX when there is "very limited overlap". *See Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 516 (6th Cir. 2007). Likelihood of confusion increases when the parties' channels of trade are the same

because consumers are more likely to encounter both goods and services. *See AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1541 (11th Cir. 1986). Furthermore, the goods or services do not need to appear side-by-side for there to be confusion. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 975 (10th Cir. 2002); *see also Frehling Enterprises, Inc. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1339 (11th Cir. 1999) ("Direct competition between the parties is not required for this factor to weigh in favor of a likelihood of confusion, though evidence that the products are sold in the same stores is certainly strong.") (citation omitted).

When looking at trade channels it is important for this Court to keep in mind that "perfect parallelism" will rarely be found. *See A & H Sportswear, Inc.*, 237 F.3d at 225. Additionally, when analyzing the trade channels factor, courts must also consider the target consumers of the goods or services. *Kibler v. Hall*, 843 F.3d 1068, 1079 (6th Cir. 2016) ("The more channels and buyers overlap, the greater the likelihood that relevant customers will confuse the sources of the parties' products.").

In the present case, Rex and BTX share overlapping consumers and trade channels. Unlike in *Leelanau*, Rex and BTX share trade channels as they both sell music in retail stores. *See* C.R. C.R. 6, Findings of Fact ¶ 19; *see Leelanau Wine Cellars, Ltd.*, 502 F.3d at 516. BTX even sells their music in Rex's own store, and goods sold in the same store are "certainly strong" evidence of likelihood of confusion. *Id.*; *see Frehling Enterprises, Inc*, 192 F.3d at 1339. Furthermore, Rex and BTX target young adults and teenagers as mentioned by the district court. *See* C.R. 10, Conclusions of Law ¶ E ("music-lovers in a similar age group"); *see Kibler*, 843 F.3d at 1079. Thus, overlapping consumers are likely to confuse Rex and BTX when they find their products sold by the same channels. Therefore, the probability of likelihood of confusion is heightened.

D. The District Court Correctly Held That Rex's Tagline Is Strong Because it Merits Commercial And Conceptual Strength.

The district court's holding was proper because Rex's federally registered trademark shows commercial and conceptual strength through its inherent potential and actual customer recognition value. The strength of a mark, in determining likelihood of confusion in a trademark case under the Lanham Act, is determined with a two-part test: (1) conceptual strength; and (2) commercial strength. *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 508 (9th Cir. 2011). Conceptual strength is the mark's inherent distinctiveness, whereas commercial strength is the acquired marketplace recognition value of the mark. *Id.* Courts have found that the stronger the mark, the more likely confusion will occur. *AutoZone, Inc. v. Strick*, 543 F.3d 923, 933 (7th Cir. 2008). Marks are also deemed stronger in the senior user's geographical and product area. *See Ameritech, Inc. v. Am. Info. Techs. Corp.*, 811 F.2d 960, 967 (6th Cir. 1987). Additionally, "the Principal Register in the Patent and Trademark Office constitutes prima facie evidence of the validity of the registered mark." *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1047 (9th Cir. 1999) (citing 15 U.S.C. § 1057(b)).

The commercial strength of a mark is determined using the same factors as the secondary meaning test, which include: "(1) the plaintiff's advertising expenditures; (2) consumer studies linking the mark to a source; (3) the plaintiff's record of sales success; (4) unsolicited media coverage of the plaintiff's business; (5) attempts to plagiarize the mark; and (6) the length and exclusivity of the plaintiff's use of the mark." *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 395 (4th Cir. 2009). In *Kellogg*, the Court found that the trademark was strong due to consumer survey data indicating a majority of consumers associated the mark with Kellogg's brands. *See Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 624(6th Cir.). On the other hand, in *Perry*, the Court held that the trademark was not commercially strong when the plaintiff only

produced 50-60 bottles of product, only had 34 documented sales, and never sold goods online. *See Perry v. H. J. Heinz Co. Brands, L.L.C.*, 994 F.3d 466, 475(5th Cir. 2021).

In the present case, Rex's trademark has conceptual strength due to the trademark being federally registered and functional. Unlike in *Perry*, Rex has a lengthy, nearly five-year history of successfully selling goods under the trademark in retail and online. *See* C.R. 4, Findings of Fact ¶ 11-12; *see Perry*, 994 F.3d at 475. Furthermore, Rex's federally registered trademark is commercially strong because the mark is used prominently throughout Rex's store and merchandise. *Id.* Following similar reasoning to the *Ameritech* case, when BTX performed for 25,000 fans in Utopia their infringement became more overt, as Rex's trademark is even stronger when infringed by someone in the Utopia area, as revealed by a survey of consumers that 50% of respondents aged 17-65 in Utopia recognized the slogan to be associated with Rex's Records. *See* C.R. 5, Findings of Fact ¶ 14; *see Kellogg Co.*, 337 F.3d at 624; *see Ameritech, Inc.*, 811 F.2d at 967. Therefore, the strength of the trademark factor should favor Rex.

E. The Actual Confusion Factor Should Be Neutral

The district court correctly ruled on the actual confusion factor due to its relative unimportance in the likelihood of confusion analysis. This is because evidence of actual confusion is usually scarce. *See Kos Pharmaceuticals, Inc.*, 369 F.3d 700, 720; 4 McCarthy on Trademarks and Unfair Competition § 23:12 (5th ed.) ("reliable evidence of actual confusion is practically almost impossible to secure."). For example, in *Kos*, the Court held that evidence of actual confusion is "difficult to find … because many instances are unreported." *Id.* Actual confusion is helpful to overwhelmingly prove likelihood of confusion, but unnecessary in almost all cases. *See id.* Here, the actual confusion factor should be neutral, as it was in the eyes of the district court,

due to the difficulty, and rarity, of finding actual confusion, and that it need not be proven to show likelihood of confusion.

F. If The Intent Factor Carries Any Weight, It Should Favor Rex.

The district court incorrectly held that BTX had no *initial* knowledge of Rex's trademark use because BTX was constructively notified, and even if BTX had no initial knowledge, this changed once Rex sent a cease-and-desist letter to BTX informing BTX of the trademark infringement. Under the Lanham Act, federal registration is considered to give constructive notice to all of the registrant's rights. *See* 15 U.S.C. § 1072; *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 362 (2d Cir. 1959); *Bucci v. Burger King Corp.*, 341 F. Supp. 223, 225 (E.D. Pa. 1972) ("The Lanham Act, 15 U.S.C. § 1072, in providing that registration of a trademark is constructive notice of the registrant's claim of ownership, eliminates the defense of good faith and lack of knowledge.").

Courts tend to not infer an intent to infringe based *solely* on continued use after being informed by a cease-and-desist letter. *Something Old, Something New, Inc. v. QVC, Inc.*, 1999 WL 1125063, at *7 (S.D. N.Y. 1999). However, continued use of one's mark after receiving a cease-and-desist letter can be seen as partial evidence of bad intent. *See Northern Light Tech., Inc. v. N. Lights Club*, 236 F.3d 57, 65 (1st Cir. 2001) (finding of bad faith "reinforced … by defendant's history of disregarding cease-and-desist letters from legitimate trademark owners"); *Gucci Am., Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 248 (S.D.N.Y. 2012) ("Guess has received numerous cease-and-desist letters in the past, which provides additional evidence to find that this factor favors Gucci."). Furthermore, even if this Court finds no intent, courts have held that intent to derive benefit is "largely irrelevant in determining if consumers likely will be confused as to source". *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1189 (6th Cir. 1988). In other words, a good

faith infringer is still an infringer, one court observing this dynamic poetically stated "Both the first user and the public may be as readily wounded by the ostrich as the fox." *See V. J. Doyle Plumbing Co. v. Doyle*, 584 P.2d 594, 597 (Ct. App. 1978).

In this case, the combination of constructive notice through federal registration and the continued use after receiving a cease-and-desist letter should be enough for this Court to find that BTX had the requisite knowledge to intend to derive benefit from Rex's trademark. Additionally, BTX's continued use after Rex sent a cease-and-desist letter shows an intent to benefit, with BTX's attorney even mentioning that stopping use would be "detrimental to the band". *See* C.R. 7, Findings of Fact ¶ 27; *see Northern Light Tech., Inc.*, 236 F.3d at 65. Ultimately, this factor may be neutral. However, when viewed in its totality, this Court should find that the factors weigh in favor of Rex and that there is likelihood of confusion.

G. The Sophistication Of The Buyer Class Is A Factor This Court Should Weigh In Favor of Rex.

Rex and BTX's target customers are teenagers who are unsophisticated, increasing the likelihood of confusion. Under the Lanham Act, a range of consumers are covered, one court put it plainly, "It may well be true that a prudent and worldly-wise passerby would not be so deceived. The law, however, protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the *ignorant, the inexperienced, and the gullible*." *Stork Restaurant v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948) (emphasis added); 4 McCarthy on Trademarks and Unfair Competition § 23:93 (5th ed.).

Here, the young target demographic of Rex and BTX is generally seen as unsophisticated, lowering the bar for likelihood of confusion. *See* C.R. 4, Findings of Fact ¶ 7; *see Malletier v. Dooney & Bourke, Inc.*, 561 F. Supp. 2d 368, 389 (S.D.N.Y. 2008) ("were targeted at consumers

who are teenagers and are presumptively not sophisticated"); *Time Inc. v. Petersen Pub. Co.*, 976 F. Supp. 263, 265 (S.D.N.Y. 1997) ("The potential buyers of the magazines in question are girls and young women ages 12 to 19, who given their age, are not very sophisticated buyers."). Rex completely renovated his store to serve a "youthful clientele". *Id.* Furthermore, the district court agrees that Rex and BTX target "teens and young adults". *See* C.R. 10, Conclusions of Law ¶ E. Here, these teenage customers are more likely to be confused about the source of a trademark due to their unsophistication. Thus, this buyer factor should weigh in favor of Rex.

WILLIAM L. STARKS

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This writing sample is an excerpt from an assignment in my Advanced Legal Writing and Research course with Professor Bryan A. Garner. I was instructed to find an opinion and rewrite the first paragraph to bring clarity to the opinion. I received an "A" in the course.

Will L. Starks

628 So.2d 923
Court of Civil Appeals of Alabama.

WALKER BUILDERS, INC.
v.
William M. LYKENS, Jr., and Tina D. Lykens.

AV93000040.
Nov. 5, 1993

STARKS, J.

Homeowners William M. Lykens, Jr., and Tina D. Lykens sued Walker Builders, Inc. for breach of contract and, after a jury trial, were awarded $20,000 in damages. In calculating these damages, the jury took into account the homeowners' mental anguish. Walker appealed arguing that there is no evidence of mental anguish, and that even if there was, the homeowners can't recover damages for mental anguish unless it was specially pleaded in their complaint. Finding both that (1) in breach of contract cases where mental anguish is an element of damages, mental anguish is considered to be general damages, which do not have to be specially pleaded, and (2) that there was evidence to support the jury's verdict, we affirm.

[Word Count: 120]

628 So.2d 923
Court of Civil Appeals of Alabama.

WALKER BUILDERS, INC.
v.
William M. LYKENS, Jr., and Tina D. Lykens.

AV93000040.
|
Nov. 5, 1993.

Synopsis
Homeowners brought breach of contract action against contractor in connection with construction of home, alleging that contractor failed to perform work in workmanlike manner and failed to provide materials of good quality. Contractor filed counterclaim, alleging that homeowners owed money for work, labor, and materials supplied. The Blount Circuit Court, Robert E. Austin, J., entered judgment in favor of homeowners on their complaint in amount of $20,000, and in favor of homeowners on contractor's counterclaim. Contractor appealed. The Court of Civil Appeals, Richard L. Holmes, Retired Appellate Judge, held that: (1) mental anguish was proper element of damages in breach of contract action, even though it was not specially pleaded, and (2) evidence was sufficient to support award of $20,000 to homeowners for contractor's breach of contract.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***923** Frank Williams, Jr., Cullman, for appellant.

C. Jackson Perkins, Birmingham, for appellees.

Opinion

***924** RICHARD L. HOLMES, Retired Appellate Judge.

This case involves the construction of a house on a three-acre lot owned by William M. Lykens, Jr., and Tina D. Lykens, husband and wife (homeowners). The homeowners entered into an agreement with Walker Builders, Inc. (Walker), to "frame-up" the house, to install the windows and doors, to install the vinyl siding, to "roof" the house, to hang the sheetrock, to install the plumbing, to build the fireplace, to install the floor coverings, and to build a back deck, with materials which Walker supplied.

On several occasions the homeowners contacted Walker to request that certain necessary repairs and corrections be made. When their verbal requests failed to get results, Mr. Lykens wrote a letter to Walker, setting out the numerous defects in the house and requesting that the defects be repaired or corrected. When this letter failed to obtain the desired result, the homeowners filed suit, alleging that Walker breached their agreement, failed to perform the work in a workmanlike manner, and failed to provide materials of good quality.

Walker filed a counterclaim, alleging that the homeowners owed $8,231.35 for work, labor, and materials supplied. A jury trial was held, and the jury returned a verdict in favor of the homeowners on their complaint in the amount of $20,000. The jury also returned a verdict in favor of the homeowners on Walker's counterclaim.

Walker appeals. This case is before this court pursuant to Ala.Code 1975, § 12–2–7(6). We affirm.

Walker raises six issues, which can be summarized into two dispositive questions: Can the homeowners recover damages for mental anguish against Walker if mental anguish was not specially pleaded? Does the evidence in this case support the verdict?

Walker contends that in a breach of contract case, mental anguish, annoyance, or inconvenience are special damages which must be specially pleaded. Walker further argues that since the complaint filed by the homeowners did not specifically request damages for mental anguish, annoyance, or inconvenience, such damages cannot be recovered in this case.

The difference between general damages and special damages has been addressed previously. This court stated:

> "General damages are those that naturally and necessarily flow from a wrongful act; special damages are

> those that flow naturally, but not necessarily, from the wrongful act."

McLendon Pools, Inc. v. Bush, 414 So.2d 92, 94 (Ala.Civ.App.1982) (citations omitted).

We note that it is generally accepted that mental anguish is not a recoverable element of damages in a breach of contract case. *B & M Homes, Inc. v. Hogan,* 376 So.2d 667 (Ala.1979). However, damages for mental anguish have been considered, and compensation for such damages has been awarded in breach of contract cases when

> " 'the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering.' "

Liberty Homes, Inc. v. Epperson, 581 So.2d 449, 454 (Ala.1991) (citations omitted) (quoting earlier cases). *See also B & M Homes, Inc.,* 376 So.2d 667, 671, and *Hill v. Sereneck,* 355 So.2d 1129, 1132 (Ala.Civ.App.1978).

The purchase of a home is the largest single investment that the average American family will make. One could reasonably foresee that faulty construction of their new home would cause a family to suffer severe mental anguish. *B & M Homes, Inc.,* 376 So.2d 667.

Based upon the foregoing, in breach of contract cases where mental anguish is an element of damages, it is considered to be general damages and does not have to be specially pleaded. Rule 9, A.R.Civ.P. Therefore, the first question, under appropriate circumstances, can be answered in the affirmative. The present case involves the construction of a new home, and mental anguish is an element of damages in this breach of contract action.

***925** Now we will consider the question of whether the evidence in this case supports the verdict. Stated another way, was there evidence of mental anguish?

Initially, we note that there does not have to be any presence of physical symptoms to document the mental anguish. In fact, the courts have allowed compensation to be awarded in cases where it was demonstrated that the wronged party suffered annoyance and inconvenience as a result of the breach. The only requirement is that the aggrieved party present evidence of his mental anguish resulting from the breach. Once such evidence is presented, the question of damages for mental anguish becomes a question of fact, which must be decided by the jury. *B & M Homes, Inc.,* 376 So.2d 667.

There was testimony regarding the defects the homeowners found in the house. These defects included exterior siding which was not properly installed and aligned so that it bowed out; windows that leaked; exterior doors that were not properly installed; French doors that leaked; spots and buckling of the vinyl flooring caused by water leaks; squeaky floors; sheetrock that was coming off the wall; sheetrock that was not hung properly on the ceilings; water supply lines and waste water drain lines that leaked; water lines that were not supported at all or improperly supported; and 2′ x 10′ timbers that were knotty, cracked, and chipped. We note that both the homeowners and Walker introduced photographs of these defects into evidence.

There was testimony that the cost of repairing the defects in this home ranged from $1,000 to $15,000. There was also testimony that the home had been appraised in the $80,000 range.

There was testimony that the homeowners were annoyed, aggravated, and upset about all the things that were not done correctly. The testimony indicated that, although they had tried to get defects repaired or corrected through the man with whom they had dealt at Walker, they were unsuccessful. Consequently, they did the repair work (that they could do) themselves. In addition, there was testimony that the homeowners were upset when one of the back steps, which had been constructed by Walker with materials it had furnished, broke while Mrs. Lykens was going down the steps, causing her to fall. Mrs. Lykens had to seek medical attention as a result of this fall.

There was evidence presented that Walker had breached its agreement with the homeowners and that the homeowners had suffered mental anguish as a result of the defects found in their newly constructed home. In light of the above testimony, there was evidence to support the jury's verdict in this case. *Liberty Homes, Inc.,* 581 So.2d 449. Therefore, this case is due to be affirmed.

The foregoing opinion was prepared by Retired Appellate Judge RICHARD L. HOLMES while serving on active duty status as a judge of this court under the provisions of § 12–18–10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

All Citations

628 So.2d 923

Applicant Details

First Name	**Jenna**
Last Name	**Thompson**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**7277981705**

Applicant Education

BA/BS From	**University of Florida**
Date of BA/BS	**December 2018**
JD/LLB From	**The Florida State University College of Law** **http://www.law.fsu.edu**
Date of JD/LLB	**May 1, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**The Florida State University Law Review** **Journal of Environmental and Land Use Law** **Journal of Transnational Law and Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Florida State University Moot Court Team**

Bar Admission

Admission(s)	**Florida**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 7, 2023

The Honorable Kimberly A. Swank
United States Courthouse
201 South Evans Street, Room 209
Greenville, North Carolina 27858

Dear Judge Swank:

I am currently an associate at the law firm Bleakly Bavol Denman & Grace. I am writing to apply for the one-year clerkship position in your chambers beginning in August 2024.

In law school, I was able to develop my legal research, writing, and critical thinking skills by competing with FSU College of Law's Moot Court team, participating on several journals, and serving as a research assistant. Additionally, while working as an associate in the commercial litigation department of Bleakley Bavol Denman & Grace, I have refined these skills by conducting legal research on complex issues and drafting various substantive legal documents, including pleadings and motions.

Discussions with several current and former judicial clerks sparked my interest in clerking for a judge. Through these conversations, I learned that clerking is an opportunity to further sharpen legal research, writing, and analytical skills, and a chance to gain unique insight into the judicial process. For these reasons, I am extremely interested in serving in this position.

My resume, unofficial transcripts, writing sample, and list of references are submitted with this application. Please let me know if I can provide any additional information. Thank you very much for considering my application.

Respectfully,

Jenna Thompson

Jenna Thompson

1226 E Cumberland Ave., Apt. 220 ♦ Tampa, FL 33602 ♦ (727) 798 – 1705 ♦ JThom341@gmail.com

EDUCATION

Florida State University College of Law — **Tallahassee, FL**
Juris Doctor, May 2022
4.013/4.0 G.P.A, Class Rank: 1/178
Book Award for Legal Writing and Research II, Corporations, Family Law, Climate Change Law and Policy, Medical Malpractice Seminar, Advanced Administrative Research, Ocean and Coastal Law, Professional Responsibility, and Criminal Procedure - Police
Managing Editor of the Florida State University Law Review, Secretary of the Florida State University College of Law Moot Court Team, Staff Editor for the Journal of Transnational Law & Policy, Staff Editor for the Journal of Land Use & Environmental Law

University of Florida — **Gainesville, FL**
Bachelor of Arts, English and Anthropology, December 2018
4.0/4.0 G.P.A.

WORK EXPERIENCE

Bleakley Bavol Denman & Grace — **Tampa, FL**
Associate — *August 2022-Present*
Perform legal research on issues arising in the context of civil litigation, with a specific emphasis on guardianship and probate matters; Draft legal documents, including pleadings and motions; Engage in trial preparation for a high-volume commercial litigation department

Florida State University College of Law — **Tallahassee, FL**
Research Assistant — *September 2021 – May 2022*
Worked under Professor Shi-Ling Hsu to conduct research on topics related to environmental law, economics, and tax law; Assisted in preparing academic papers for publication

Florida Fish and Wildlife Conservation Commission — **Tallahassee, FL**
Legal Extern — *January 2022 – April 2022*
Conducted research and drafted legal memoranda for attorneys in the Office of General Counsel to assist with advising the agency's various departments; Participated in program, staff, and Commission meetings; Attended depositions and a mediation

Bleakley Bavol Denman & Grace — **Tampa, FL**
Summer Associate — *May 2021 – August 2021*
Performed research on matters handled by a full-service litigation firm, including guardianship, premises liability, contracts, workers' compensation insurance, and more; Drafted legal documents such as motions, answers, and objections; Attended and completed summaries for depositions and hearings

Florida State University College of Law — **Tallahassee, FL**
Teaching Assistant — *May 2020 – August 2020*
Assisted with the delivery of the Legislation and Regulation course for the Juris Master degree program; Developed course materials; Provided feedback on student assignments weekly; Served as a resource to students to facilitate their learning

Clearwater Marine Aquarium — **Clearwater, FL**
Guest Experience Associate — *January 2019 – July 2019*
Delivered informative and engaging presentations; Led behind the scenes guided tours of the facility; Educated the visiting public on marine life and environmental conservation

University of Florida Department of Recreational Sports — **Gainesville, FL**
Operations Associate and Supervisor — *April 2017 – December 2018*
Maintained excellence in the quality of recreation, sport, and fitness facilities; Facilitated efficient and accurate execution of schedules and activities across departments; Created a positive and welcoming atmosphere for patrons; Served as a resource and model for employees under my leadership

University of Florida Department of Housing and Residence Education — **Gainesville, FL**
Resident Assistant — *June 2016 – August 2016*
Cultivated an inclusive community environment by hosting social events and interacting with residents on an individual level; Maintained safety in the residence halls; Connected residents with relevant campus resources designed to promote personal development and academic success

SERVICE EXPERIENCE

University of Florida Campus Diplomats — **Gainesville, FL**
Official Ambassador for the Dean of Students Office — *2017 – 2018*

University of Florida English Language Institute — **Gainesville, FL**
Conversation Partner — *2017*
Assisted non-native speakers in improving language proficiency

Suncoast Hospice — **Palm Harbor, FL**
Provided palliative care to terminally ill individuals; Offered support to family members — *2011 – 2015*

August 7, 2023

Honorable Kimberly A. Swank
United States Courthouse
201 South Evans St., Rm 209
Greenville, NC 27858

Dear Judge Swank,

It is my great pleasure to write this letter of recommendation for Jenna Thompson in connection with her application for a clerkship.

I coached Jenna in the Gabrielli Family Law Moot Court Competition in 2021, and sat as a panelist for her when she was preparing for the Lachs Space Law Competition in 2022. I have been coaching moot court teams at Florida State for about 25 years, and have had the privilege of working with dozens of strong, motivated students. Jenna stands out for several reasons. Her preparation was superb. She was meticulous and thorough in all aspects of researching and drafting the brief. She asked intelligent, thoughtful questions when she needed to, and was receptive to feedback and suggestions. She kept me informed of her progress so that I did not once have to remind her or follow up with her on anything we had discussed. Once the brief was "filed" and we began practice rounds, she brought all those qualities to her preparation for oral argument. During both competitions she was managing a demanding schedule and she did so with grace and humor. She was a quarterfinalist in the Gabrielli, and a semifinalist at the Lachs.

The Gabrielli competition was especially challenging because, in 2021, the entire event took place via Zoom, and thus all our practice rounds were held remotely. We have all had to adjust to that format, so I won't belabor the advantages and disadvantages. I simply want to say Jenna and her teammate were so engaged during the months leading up to the competition that, when I went to the law school to sit with them during the event itself, it came as a surprise to realize I had not been in the same room with them for almost two months.

Jenna will be an excellent clerk and colleague. I recommend her with enthusiasm.

Sincerely,

Barbara J. Busharis
Assistant Public Defender, Second Judicial Circuit
Capital Appeals
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
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The following is an excerpt from an Appellate Brief I submitted in my Legal Writing and Research class. I am happy to provide a copy of the entire work upon request.

STATEMENT OF THE CASE AND FACTS

Appellee Jim Hopper is a licensed public chauffeur in Chicago. R. at 15-16. In 2018, Mr. Hopper discovered a job listing seeking taxi drivers posted by appellant, Chicago-based taxi company LadyCab, Inc. R. at 15. After determining he met all the requirements set forth in the advertisement, Mr. Hopper applied for the position. R. at 15. The following day, Mr. Hopper was notified that his application had been received but that he would not be offered employment or even an interview. R. at 15. Surprised that his application was rejected so quickly, Mr. Hopper asked a female friend with similar credentials to apply for the same position with LadyCab. R. at 15. Unlike Mr. Hopper, his female friend promptly received an invitation to interview for the position. R. at 17.

Believing that LadyCab did not hire him because he is male, Mr. Hopper filed an action against LadyCab, alleging that the company discriminated against him on the basis of sex in violation of the Civil Rights Act of 1964. R. at 37. LadyCab admitted it rejected Mr. Hopper's application and refused to interview him because he is male. R. at 23. LadyCab maintained that, since its objective is to offer safe, secure rides to female passengers, hiring only female drivers is necessary to the operation of its business. R. at 25. Consequently, LadyCab asserted a bona fide occupational qualification defense to Mr. Hopper's claim of discrimination. R. at 27. LadyCab insisted that being female is a bona fide occupational qualification for its taxi drivers because its customers require the security provided by such a driver and would not use LadyCab's services otherwise. R. at 27. Moreover, LadyCab claimed that there are no reasonable alternatives to its sex-based hiring policy. R. at 26.

LadyCab is the only taxi company in Chicago that does not hire both male and female drivers. R. at 19. Testimony by an industry veteran indicates that companies without sex-based hiring policies are successful, profitable, and enduring. R. at 19. Moreover, the same testimony reveals that the inability of taxi companies to immediately accommodate requests for drivers of a specific sex costs them to lose business in a nearly negligible number of situations. R. at 20.

In light of this evidence, Mr. Hopper moved for summary judgement. R. at 37. After considering the evidence, the court concluded that being female is not a bona fide occupational qualification for the position of taxi driver and granted Mr. Hopper's motion. R. at 37. This appeal followed. R. at 37.

STANDARD OF REVIEW

The standard of review for granting a motion for summary judgement is de novo. McDaniel v. Progress Rail Locomotive, Inc., 940 F.3d 360, 367 (7th Cir. 2019) (citing C.G. Schmidt, Inc. v. Permasteelisa N. Am., 825 F.3d 801, 805 (7th Cir. 2016)). A motion for summary judgement is appropriate when there is no issue of material fact and when judgement as a matter of law should be granted in favor of the moving party. Fed. R. Civ. P. 56(a). Specifically, summary judgement is required when a party fails to offer sufficient evidence to support an element that is critical to that party's case, and on which the party "will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

SUMMARY OF ARGUMENT

Summary judgement for Mr. Hopper is appropriate in this case because LadyCab's assertion of a bona fide occupational qualification ("BFOQ") defense is invalid. LadyCab has not shown that being female is reasonably necessary to the essence of its business since both males and females are capable of performing the jobs that are central to the business's main function of

transportation, and hiring males would not undermine LadyCab's business operations. Additionally, LadyCab has not demonstrated that there are no reasonable alternatives to its sex-based hiring policy, and LadyCab's characterization of sex as a BFOQ is based on customer preference and stereotypes. Because LadyCab has not satisfied the threshold "essence of the business test" or other tests established by existing case law, its assertion of the BFOQ defense is invalid and the court should affirm summary judgment in favor of Mr. Hopper.

ARGUMENT

I. Summary judgement is appropriate because LadyCab cannot assert a valid BFOQ defense.

Summary judgement for Mr. Hopper is appropriate because LadyCab's assertion of a BFOQ defense is invalid. Employers may not invoke a BFOQ defense to discriminate on the basis of sex unless sex is a bona fide occupational qualification that is reasonably necessary to the normal operation, or "essence," of their business. 42 U.S.C. § 2000e-2(e) (2018). Sex is not reasonably necessary to the essence of a business if both sexes are able to perform the indispensable functions of the job and the business would not be undermined by hiring members of both sexes. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971). Moreover, employers cannot establish that sex is a BFOQ if there are reasonable alternatives to the sex-based employment policy or if their characterization of sex as a BFOQ is based on customer preference or stereotypes. Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052, 1068 (D. Ariz. 1999); Ambat v. City & Cty. of S.F, 757 F.3d 1017, 1029 (9th Cir. 2014). In this case, LadyCab has not shown that being female is reasonably necessary to the essence of its business since males and females are able to perform the jobs integral to the business's main function of transportation, and LadyCab's business operations would not be undermined by hiring both sexes. Additionally, LadyCab has not demonstrated that the alternatives suggested are unreasonable and LadyCab's characterization of

sex as a BFOQ is based on customer preference for female drivers and a stereotyped view of males as perpetrators of sexual assault. Thus, LadyCab's BFOQ defense is not valid, and summary judgement in favor of Mr. Hopper is appropriate.

A. LadyCab's BFOQ defense is invalid because LadyCab did not show that being female is reasonably necessary to the essence of its business.

LadyCab did not assert a valid BFOQ defense because it did not show that being female is reasonably necessary to the essence of its business. Sex is not reasonably necessary to the essence of a business if both sexes are able to perform the business's indispensable jobs and hiring both males and females would not undermine the business's operations. Diaz, 442 F.2d 385, 388; Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991).

Sex is not reasonably necessary to the essence of an employer's business when both sexes are able to perform the jobs central to the business's main functions. Diaz, 442 F.2d 385, 388. For example, in Diaz v. Pan American World Airways, an airline refused to hire males for the position of flight attendant because of their sex. Id. at 386. The airline asserted that being female constituted a BFOQ for the job because females are better able to tend to the "psychological needs" of passengers. Id. at 387. The court held that sex was not necessary to the essence of the airline's business because the "non-mechanical" aspects of a flight attendant's job are "tangential," rather than central, to an airline's main function of transporting passengers. Id. at 388. The court also pointed out that many airlines hire flight attendants of both sexes. Id. This fact reinforced the assertion that both sexes can perform the jobs central to an airline's main function. Id. Thus, even though males were allegedly unable to perform some of the tasks associated with the airline's operations, both sexes could perform the most indispensable jobs, demonstrating that sex was not reasonably necessary to the essence of the airline's business. Id.

Additionally, sex is not necessary to the essence of a business if hiring both sexes would not undermine the business's core operations. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). In Dothard v. Rawlinson, a prison claimed that sex was a BFOQ for the position of correctional counselor. Dothard, 433 U.S. 321, 321. The prison asserted that there was a high probability that the inmates in an all-male facility would assault a woman, which would pose a threat to the security of the prison overall. Id. at 336. The court agreed, holding that sex was necessary to the essence of the prison's business because the "very womanhood" of females would diminish the security of the facility as a whole, contravening the prison's primary purpose. Id. Therefore, because hiring women would undermine the prison's main function, sex was reasonably necessary to the essence of its business. Id.

In this case, LadyCab has not shown that being female is reasonably necessary to the essence of its business. First, LadyCab has not demonstrated that males are incapable of performing the job that is indispensable to LadyCab's main function of providing transportation: driving taxis. This case is like Diaz. The tangential nature of the ability of females to meet to the psychological needs of passengers in Diaz is analogous to the peripherality of males' inability to "provide a sense of security" to LadyCab's customers in this case. R. at 9. Moreover, in both cases, other companies in the same industries hire males and females, indicating that both sexes are able to perform the businesses' most indispensable jobs. Thus, LadyCab has not shown that males are unable to perform the job central to its business, and therefore, sex is not reasonably necessary to its essence.

Furthermore, LadyCab has not demonstrated that hiring both males and females would undermine its business operations. Mr. Hopper's case is distinguishable from Dothard. Unlike Dothard, where the womanhood of potential female counselors constituted a threat to the essence

of the prison's business of maintaining a secure facility, the masculinity of male taxi drivers does not impair the essence of LadyCab's business of providing transportation. Males are indisputably able to drive taxis, and their sex rarely discourages passengers from riding. R. at 20. This shows that the essence of LadyCab's business would not be undermined by hiring both males and females. Thus, sex is not reasonably necessary to the essence of LadyCab's business and its assertion of a BFOQ defense is invalid.

B. Case law demonstrates that LadyCab's BFOQ defense is invalid.

Existing case law illustrates that LadyCab's assertion of a BFOQ defense is invalid, as it establishes other situations in which sex does not constitute a BFOQ. Sex is not a valid BFOQ if there are reasonable alternatives to the sex-based employment policy or if the characterization of sex as a BFOQ is based on customer preference or stereotypes. Olsen, 75 F. Supp. 2d 1052, 1068; Ambat, 757, F.3d 1017, 1029. LadyCab has not demonstrated that there are no reasonable alternatives to its hiring policy, and LadyCab's characterization of sex as a BFOQ is based on a customer preference for female drivers and a stereotyped view of men perpetrators of sexual assault. Thus, LadyCab's BFOQ defense is invalid.

i. There are reasonable alternatives to LadyCab's sex-based hiring policy.

LadyCab has not demonstrated that there are no reasonable alternatives to its sex-based hiring policy. A BFOQ defense is valid if an employer establishes there are no reasonable alternatives to its sex-based hiring policy. Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1415 (N.D. Ill. 1984). An employer fails to prove that there are no reasonable alternatives when the employer groundlessly disposes of an alternative as too costly or renders an alternative unreasonable because is not entirely flawless. Henry v. Milwaukee Cty., 539 F.3d 573, 582 (7th Cir. 2008); Ambat, 757, F.3d 1017, 1028. Because LadyCab declared that hiring male drivers

would be too costly without providing support for that assertion, and deemed background checks inadequate because they do not absolutely guarantee clean records, LadyCab has not established there are no reasonable alternatives to its sex-based hiring policy.

An employer fails to show that there are no reasonable alternatives if they contend that proposed alternatives are too expensive without researching the cost. Henry, 539 F.3d 573, 582. In Henry, a jail claimed that the numerous available alternatives to its sex-based hiring policy were "prohibitively costly," but offered no "data" to support this assertion. Id. at 581-82. The court held that employers must investigate the costs of alternatives. Id. at 582. Because the jail did not do so, it failed to show there were no reasonable alternatives to its sex-based hiring policy. Id. at 582, 585.

Moreover, an employer cannot establish there are no reasonable alternatives if they dispose of an alternative because it is not flawless. Ambat, 757, F.3d 1017, 1028. In Ambat, a jail declared that background checks were an inadequate alternative to a sex-based hiring policy that barred men from working in female housing pods because the background checks could not "detect all potential perpetrators" of sexual misconduct. Id. at 1029. The court, however, determined that even though the screenings were not "perfect," they still offered a "practical" way to differentiate qualified applicants from those who were not. Id. at 1028. Thus, the court held that the jail failed to establish that there were no reasonable alternatives to its sex-based hiring policy. Id.

Mr. Hopper's case is like both Henry and Ambat. Similar to the employer in Henry, who prematurely dismissed any potential alternatives as too costly, LadyCab asserts that alternatives involving hiring male drivers presents a financial burden without providing foundation. R. at. 32. In the same way the employer in Henry was not permitted to forgo investigating the costs of potential alternatives, LadyCab should not be allowed to assert that hiring male drivers would be

devastatingly expensive without researching the costs involved. R. at 32. Thus, because LadyCab has not investigated the costs associated with alternatives involving hiring male drivers, it has not established that there are no reasonable alternatives to its sex-based hiring policy.

LadyCab is also like Ambat, as the employers in both cases ruled out the reasonable alternative of background checks because they are not flawless. The jail's dismissal of background checks in Ambat on the grounds that they do not weed out all perpetrators parallels LadyCab's contention that the very same screening method is deficient because it does not reflect first offenses or unreported assaults. R. at 31. The court in Ambat held that, even though they are not perfect, background checks still offer a realistic way to distinguish qualified candidates. The same reasoning applies in this case, as implementing background checks would filter out potential perpetrators effectively and practically. Thus, background checks offer a reasonable alternative to LadyCab's sex-based hiring policy, and therefore, LadyCab has not shown that there are no reasonable alternatives.

ii. LadyCab's characterization of sex as a BFOQ is based on customer preference.

LadyCab's BFOQ defense is also invalid because the company's characterization of sex as a BFOQ is based on customer preference. Customer preference cannot justify sex as a BFOQ unless it is necessary to the essence of the company's business. Diaz, 442 F.2d 385, 388.

Customer preference that is not necessary to the essence of a business cannot validate a BFOQ defense when an employer incorrectly assumes that implementing the preference in a hiring policy amounts to protecting a legitimate interest. Olsen, 75 F. Supp. 2d 1052, 1068. In Olsen, a spa contended that being female was a BFOQ for the job of massage therapist to protect the privacy of its customers. Id. at 1057. However, evidence, including a survey revealing guests' preference for female massage therapists, revealed that customer preference, and not privacy, was the driving

force behind the spa's hiring policy. Id. at 1063. Because customer preference for female massage therapists was not necessary to the essence of the company's business of providing massages, and the policy was not actually protecting a legitimate interest, the court held that the spa's BFOQ defense was invalid. Id. at 1068.

Mr. Hopper's case is like Olsen. In Olsen, the spa incorrectly assumed that effectuating a customer preference for female massage therapists in its hiring policy constituted protecting customers' privacy interests. Similarly, in this case, LadyCab erroneously concludes that implementing the customer preference for female drivers amounts to protecting customers' interests in privacy, safety, and security. R. at 25. Furthermore, customer preference was not necessary to the essence of the spa's business in Olsen, and the record in this case indicates the same reality. While the majority of LadyCab's customers expressed a preference for female drivers in a survey, that is only one of the reasons they use LadyCab, which does not establish they would not use the service otherwise. R. at 26. Thus, because customer preference is not necessary to the essence of LadyCab's business and implementing a customer preference for females in LadyCab's hiring policy does not amount to protecting a legitimate interest, LadyCab's BFOQ defense is invalid.

iii. LadyCab's characterization of sex as a BFOQ is based on stereotypes.

LadyCab's BFOQ defense is invalid because it is based on a stereotyped view of men. An employer cannot assert a BFOQ defense to uphold a sex-based hiring policy if it is founded on stereotypes. Ambat, 757, F.3d 1017, 1029.

Sex-based hiring policies are rooted in stereotypes unless factual support demonstrates that all or nearly all members of a certain sex possess the qualities the policy is designed to manage. Id. In Ambat, the employer provided statistics on incidents of sexual misconduct perpetrated by

males to support a sex-based hiring policy. Id. The court determined that the statistics alone were not enough to show that all or a majority of males would likely engage in sexual misconduct, and to imply as much would be to perpetuate a speculative stereotype. Id. Because the BFOQ was based on a stereotype, the court held that it was not valid. Id.

This case is like Ambat, as the employers in both rely on stereotypes of males as sexual assailants to validate sex as a BFOQ. The limited statistics offered in Ambat are akin to the few reports LadyCab provided in this case. R. at 25, 33-36. Just like the evidence in Ambat failed to constitute a factual basis for the employer's view of males, the evidence here is similarly insufficient to show that a large number of male taxi drivers are predisposed to commit sexual assault and therefore cannot provide safe and secure rides. Thus, the LadyCab's characterization of sex as a BFOQ is rooted in stereotypes and its assertion of a BFOQ defense is invalid.

C. Policy considerations urge against expanding the BFOQ defense.

Relevant policy considerations also militate against allowing LadyCab's use of the BFOQ defense. Ruling in favor of LadyCab would constitute an impermissible expansion of the BFOQ defense, which does not align with the narrow interpretation of the defense espoused by both the Equal Employment Opportunity Commission and numerous courts. Olsen, 75 F. Supp. 2d 1052, 1060, 1068. Expanding the interpretation of the defense in this case would be tantamount to disturbing the balance of power between the separate branches of government, and it has the potential to render the BFOQ defense relatively unrestrained.

As a result of the diminished limitations on the use of the BFOQ defense, other employers might be encouraged to assert that sex is a valid BFOQ in situations where the reasons for the discrimination are only tenuously related to the essence of the employer's business, which is the case here. As some scholars have noted, there is strong evidence showing that many differences

between men and women are the products of socialization, rather than inherent phenomena. Katie Manley, The BFOQ Defense: Title VII's Concession to Gender Discrimination, 16 DUKE J. GENDER L. & POL'Y. 169, 201 (2009). Consequently, expanding the application of the BFOQ defense would exacerbate and perpetuate these gender-based differences as well as further the damaging stereotypes they give rise to. Thus, acknowledging LadyCab's assertion that sex is a BFOQ in this case would have determinantal repercussions in the world of employment and far beyond.

CONCLUSION

In conclusion, LadyCab failed to show that sex is reasonably necessary to the essence of its business, LadyCab did not establish that there are no reasonable alternatives to its sex-based hiring policy, and LadyCab based its characterization of sex as a BFOQ on customer preference and stereotypes. Thus, LadyCab's assertion of the BFOQ defense is invalid and the court should affirm summary judgement in favor of Mr. Hopper.

Applicant Details

First Name	**Neha**
Last Name	**Vasagiri**
Citizenship Status	**U. S. Citizen**
Email Address	**neha.vasagiri@gmail.com;vasagirineha@gmail.com**
Address	**Address** **Street** **2136 Feathermint Drive** **City** **San Ramon** **State/Territory** **California** **Zip** **94582** **Country** **United States**
Contact Phone Number	**+1 925 667 1548**

Applicant Education

BA/BS From	**King's College London**
Date of BA/BS	**May 2024**
JD/LLB From	**Other** **http://www.lawschool.edu**
Date of JD/ LLB	**June 2, 2024**
LLM From	**Georgetown University Law Center**
Date of LLM	**June 2, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**

Moot Court Name(s)	**LSE-Featherstone SOGI Moot** **Nelson Mandela World Human Rights Moot**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning**

Recommenders

Thomas, John
jrt6@law.georgetown.edu
202-662-9407
Laing, Andrew
Andrew.Laing@georgetown.edu
Cohen, Julie
jec@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Neha Vasagiri
2136 Feathermint Drive
San Ramon, CA 94582

August 6, 2023

Honorable Kimberly A. Swank
United States Courthouse
201 South Evans Street, Room 209
Greenville, NC 27858

Dear Judge Swank:

I am writing to apply for a 2024-2025 term clerkship with your chambers. I am a rising final year student pursuing a joint dual-degree, earning a Master of Laws (LL.M.) from Georgetown University Law Center and a Bachelor of Laws (LL.B.) from King's College London, with an expected graduation date of May 2024.

I am confident that I could meaningfully contribute to the U.S. District Court's work in the Eastern District of North Carolina. While working at an international boutique law firm, I contributed to restructuring projects for multinational companies in light of tax obligations and shifting geopolitical tensions. I also assisted in drafting trust structures to protect assets from creditors in case of bankruptcy. As a research assistant for Professor Claussen at Georgetown Law, I compile various sources to create succinct summaries of mechanisms under the United States-Mexico-Canada Agreement. As an intern for the U.S. Department of Justice Criminal Division, I wrote thorough and precise memoranda reviewing U.S. treaty obligations. Additionally, I analyzed asset forfeiture requests to trace and identify assets. As a writer for the Lawyers Without Borders King's College London Student Division, I wrote and published articles relating to rule of law issues and human rights violations. These experiences have sharpened my ability to strategically approach and answer complex legal questions.

My resume, law transcripts, writing sample, and letters of recommendation are submitted with this application. My recommenders are:

Ms. Julie Cohen
Professor, Georgetown University Law Center
Jec@law.georgetown.edu

Mr. John R. Thomas
Professor, Georgetown University Law Center
John.Thomas@law.georgetown.edu

Mr. Andrew W. Laing
Professor, Georgetown University Law Center
Andrew.Laing@georgetown.edu

I would welcome the opportunity to interview with you, and look forward to hearing from you soon.

Respectfully,

Neha Vasagiri

VasagiriNeha@gmail.com • U.S. Citizen • Linkedin.com/in/neha-vasagiri

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — Washington, DC
Master of Laws — Expected May 2024
GPA: 3.90/4.33
Honors and Awards: Director's List
Activities: The Nelson Mandela World Human Rights Moot; Co-President, Center for Transnational Legal Studies; LL.M. Representative, National Security Law Society; Member, Corporate and Financial Law Organization

KING'S COLLEGE LONDON — London, United Kingdom
Bachelor of Laws, Honors — Expected May 2024
GPA: 3.8 Equivalent
Honors and Awards: Dean's Commendation (2020 - 2022), Silver Crown Award
Activities: Semi-Finalist, LSE-Featherstone SOGI Moot; Head of Events, Lawyers Without Borders; Law Events Officer, Black Asian Minority Ethnic ITC; Member, Bar & Mooting Society

EXPERIENCE

WITHERS LLP — Singapore
US Summer Associate — May 2023 - July 2023
- Drafted restructuring proposals for multinational companies to reflect changes to ownership and funding strategies
- Researched capital gains, transfer, and income tax obligations for trusts with multi-jurisdictional elements

GEORGETOWN UNIVERSITY LAW CENTER — Washington, DC
Research Assistant — April 2023 - Present
- Researched United States-Mexico-Canada Agreement (USMCA) Rapid Response Labor Mechanism (RRM) situations for the publication of a paper on labor and environment provisions in trade agreements

U.S. DEPARTMENT OF JUSTICE, OFFICE OF INTERNATIONAL AFFAIRS — Washington, DC
Fall Legal Intern — August 2022 - January 2023
- Analyzed incoming extradition and asset forfeiture requests relating to crimes including money trafficking, drug trafficking, homicide, sexual violence, fraud, and blackmail to determine Treaty and U.S. legal obligations
- Prepared Mutual Legal Assistance Treaty requests, Extradition packages, Provisional Arrest Requests, and Asset Forfeiture requests for submission to the U.S. State Department, foreign governments, and Assistant U.S. Attorneys

LAWYERS WITHOUT BORDERS KING'S COLLEGE LONDON STUDENT DIVISION — London, United Kingdom
Writer — October 2020 - December 2022
- Wrote two articles on human rights violations and rule of law issues globally, including analyzing the impact of policy decisions upon demographic disparities in criminal justice systems in the U.S. and the U.K.

SENIOR OF COUNSEL JAMES BROSNAHAN — San Francisco, CA
Researcher — June 2022 - September 2022
- Edited two articles and publications about the judicial process and the merits of a good judge
- Analyzed the interrelation between groundbreaking judicial decisions in activist courts and public opinion

MORRISON FOERSTER — San Francisco, CA
Summer Intern — May 2022 - August 2022
- Developed ideas for content and strategy for running two Emerging Companies Venture Capital (ECVC) events
- Audited department budgets, developed master pitch decks, and reviewed over 500 Salesforce and LinkedIn accounts

KING'S COLLEGE LONDON INTELLECTUAL PROPERTY (IP) CLINIC — London, United Kingdom
Student Director — October 2021 - May 2022
- Conducted legal research on IP law, including foreign jurisdictions, to market to and advise U.K. businesses

OTHER INFORMATION

Language Skills: English (Native), Hindi (Fluent), Chinese (Basic), French (Basic)
Publications: Contributor, ABA Antitrust Indirect Purchaser Litigation Handbook
Personal Interests: Third-degree black belt in Taekwondo

Record of Agreed Results

Family name: Vasagiri
Given names: Neha
Date of birth: 16 August 2002
Student number: 20000235

Programme: Bachelor of Laws (Hons) English Law and American Law
Mode of study: Full Time
Programme start date: 28 September 2020
Programme end date: 2 June 2024

Module Code	Title	Level	Attempt	Mark	Grade	Credits	ECTS Credits
4FFLK901	Legal Reasoning and Legal Services	4	1		P	0	0.0
4FFLK902	Elements of The Law of Contract	4	1	65	P	30	15.0
4FFLK903	Criminal Law	4	1	65	P	30	15.0
4FFLK904	Public Law	4	1	67	P	30	15.0
4FFLK905	European Law	4	1	70	P	30	15.0
	TOTAL YEAR 2020/21 CREDITS					**120**	**60.0**

Module Code	Title	Level	Attempt	Mark	Grade	Credits	ECTS Credits
0FFLK001	Decision Making	3	1		P	0	0.0
6FFLK001	Law of Tort	6	1	63	P	30	15.0
6FFLK002	Law of Property	6	1	70	P	30	15.0
6FFLK003	Law of Trusts	6	1	69	P	30	15.0
6FFLK053	Principles of Enterprise Law	6	1	64	P	30	15.0
	TOTAL YEAR 2021/22 CREDITS					**120**	**60.0**

King's College London

Record of Agreed Results

Module Code	Title	Level	Attempt	Mark	Grade	Credits	ECTS Credits
5XAZA000	Study Abroad (0 credits)	5				0	0.0
	TOTAL YEAR 2022/23 CREDITS					**0**	**0.0**
	TOTAL CREDITS AWARDED					**240**	**120.0**

Signature:

Darren Wallis

Capacity: Executive Director, Education and Students

Official stamp or seal:

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Neha Vasagiri
GUID: 819291199

Course Level: Master of Laws

Entering Program:
Georgetown University Law Center
Master of Laws
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWG	160	11	Drafting Contracts Sherri Beatty-Arthur	2.00	P	0.00	
LAWG	2039	10	U.S. Criminal Procedure Andrew Laing	2.00	A	8.00	
LAWG	332	05	Patent Law John Thomas	3.00	A-	11.01	
LAWG	396	10	Securities Regulation Barry Summer	2.00	A-	7.34	
LAWG	844	18	U.S. Legal Research Analysis & Writing Michael Smith	2.00	P	0.00	
LAWG	978	11	Introduction to U.S. Legal Systems Craig Hoffman	2.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	7.00	26.35	3.76
Cumulative	13.00	7.00	26.35	3.76

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1160	78	Core Course: Trans Law: Intro	2.00	A	8.00	
LAWJ	1161	78	Trns Law Colloquium & Lectures	1.00	P	0.00	
LAWJ	182	78	World Trade Law	2.00	A	8.00	
LAWJ	1820	78	Comp Fin Reg Arch in Fed St	3.00	A	12.00	
LAWJ	1824	78	Tech Platform Gov in Glob Pers	3.00	A	12.00	
LAWJ	667	78	Global Practice Exercise	1.00	P	0.00	

Directors' List (top 15%)

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	12.00	10.00	40.00	4.00
Annual	25.00	17.00	66.35	3.90
Cumulative	25.00	17.00	66.35	3.90

End of Master of Laws Record

August 06, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am an Appellate Counsel with the Fraud Section of the Criminal Division of the U.S. Department of Justice, and during the Fall 2022 semester I had the pleasure of teaching Neha Vasagiri in my U.S. Criminal Procedure course as an adjunct professor at Georgetown. The course, which covers the investigative side of criminal procedure and touches on aspects of the Fourth, Fifth, Sixth, and Fourteenth Amendments, is fast-paced and wide-ranging, exposing students to a variety of complex constitutional topics and requiring a great deal of weekly reading.

Neha was an excellent, attentive student and a pleasure to have in my class. She was consistently well prepared, whether or not she was “on call” for a particular session, and her questions and comments reflected a sincere curiosity about and intellectual engagement with the material. I often ask “on call” students to take the class through the facts of particular cases, and I recall Neha’s exceptionally thorough preparation when I asked her to discuss *Illinois v. Rodriguez* (the consent-to-search case reminding us that courts do not require that agents of the government “always be correct, but that they always be reasonable”). She not only offered a complete factual summary, but ably discussed the principles animating the Court’s decisionmaking and thoughtfully considered the desirability of rules allowing for reasonable mistakes. By the end of the semester, I knew that her contributions to our classroom discussions would always be substantive, valuable, and well thought-out. She performed quite well on the final exam, earning an A overall. I was particularly impressed by her answers’ organization; despite the three-hour time constraint, she took the time to clearly and logically structure each of her answers, and that organizational skill allowed her to plainly demonstrate her solid understanding of the voluminous material we covered.

I am pleased to wholeheartedly recommend Neha for a federal clerkship.

Sincerely,

Andrew Laing

Andrew Laing - Andrew.Laing@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

August 06, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing to offer my strong support for Neha Vasagiri's application for a clerkship in your chambers.

I taught Neha this past semester (Spring 2023) in two courses at our Center for Transnational Legal Studies in London. Although final grades are not yet available for either class, both classes required written work and oral participation, and so I have seen enough of her work to form a very favorable opinion of her abilities.

Neha made clear from the first day of class that she was highly motivated to succeed. She took class preparation seriously, volunteered frequently in class discussions, and quickly earned the respect of her peers as she parsed through complicated topics like transnational tort litigation or the scope of tech platform liability for illegal online content. She wrote four short reaction papers on assigned dates for the courses on Technology Platform Governance in Global Perspective and two slightly longer reaction papers on assigned dates for the courses on Transnational Law: Introduction and Selected Issues. The papers were uniformly of high quality, revealing a strong grasp of the assigned readings and a clear and economical prose style.

Neha is also writing a longer research paper for the Technology Platform Governance course. The paper explores questions about tort doctrine and theory that would need to be answered if platforms' statutory immunity from suit under section 230 of the Communications Decency Act were narrowed to permit suit against them for recommending and amplifying terrorist recruiting videos. I've reviewed two drafts and am impressed with the thoroughness of her research and with her ability to digest and present complex bodies of doctrine concisely. Based on what I have seen, I think she will make a very good judicial clerk indeed.

As I have to know Neha better over the course of the semester, I have learned that she brings a fearsome work ethic to all of her endeavors—which include, in addition to law school, a black belt in Taekwondo. She hopes to become a litigator in private practice representing defendants in white collar and agency enforcement matters with international dimensions, and she has prepared herself for that path diligently, interning at the U.S. Department of Justice last fall and heading to Singapore for an internship later this year. At the same time, she is passionate about human rights law. She has volunteered with the student division of Lawyers Without Borders and will represent the Center for Transnational Legal Studies at the Nelson Mandela World Human Rights Moot this summer.

Please feel free to email me at jec@law.georgetown.edu if you have further questions.

Very truly yours,

Julie E. Cohen
Mark Claster Mamolen Professor of Law and Technology

WRITING SAMPLE

Neha Vasagiri
2136 Feathermint Drive
San Ramon, CA 94582

The following writing sample is a paper which I wrote for submission in the Technology Platform Governance in Global Perspective course taught by Professor Julie Cohen. Written prior to the Supreme Court's judgment in *Gonzalez v. Google*, the paper focused on the effects of a potential restriction in the application of section 230 of the Communications Decency Act (CDA).

Applying Products Liability to Algorithmic Harms

In December 2005, the New York Supreme Court found in *Stratton Oakmont Inc. v. Prodigy Services Co.* that certain statements being published by users upon a website bulletin board could be used to hold the platform providers liable.[1] This decision spurred the creation of section 230 of the Communications Decency Act, which sought to achieve policy objectives including "prom[oting] the continued development of … interactive computer services," and "preserv[ing] the vibrant and competitive free market that presently exists for … interactive computer services, unfettered by Federal or State regulation."[2] Less than thirty years later, Congress' strongly criticized laissez faire approach to platform provider regulation has come at a steep cost to consumers.[3] The section 230 defense has allowed for the unfettered expansion of Silicon Valley, allowing platform providers to avoid liability even when they fail to act in light of specific knowledge of harmful content on their platform and awareness of the impact it causes.[4] Consequently, the defense has proven itself invariably useful to platform providers, preventing individuals harmed due to platforms recourse under civil law, which notably includes tort law.[5] Tort law is a comparatively flexible legal framework which assigns compensatory damages for the degree of harm experienced by the plaintiff.[6] In its most idealized format, tort law is designed to address the "twin ambitions" of "reduc[ing] the accident rate by fine-tuned control of all corporate operations and…provid[ing] a system of injury compensation."[7] Those two aims may be more easily expressed as deterrence and compensation, through which justice may be achieved.[8] Tort

[1] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).
[2] Communications Act of 1934, § 230, 47 U.S.C.A. § 230.
[3] See, e.g., *Chicago Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008), as amended (May 2, 2008) ("the 'Communications Decency Act'—bears the title 'Protection for "Good Samaritan" blocking and screening of offensive material', hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?").
[4] Anupam Chandler, *How Law Made Silicon Valley*, 63 Emory L.J. 639, 655 (2014); *see also* Reynaldo Gonzalez v. Google LLC, (2022), cert.
[5] Brief for Twitter, Inc. as Amicus Curiae, p. 1, *Gonzalez v. Google LLC* (2023) ("Twitter has keen interests in the outcome of [*Gonzalez v. Google*]. For more than a quarter century, courts have construed Section 230(c)(1) to protect interactive computer service providers from liability arising from third-party content on their websites. Twitter has built its platform based on that construction.").
[6] S. REP. 101-303 ("The establishment of a national tort compensation scheme was never intended by the framers of the Constitution... A homogenized legal system would not take into account the cultural and historical foundations found in each of the states. The step toward a unified system of tort compensation… is a dangerous precedent that might upset the delicate balance of power that has been established over centuries between the Federal Government and the several states.").
[7] George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 1 (1987).
[8] The objective of justice is sometimes suggested as an individual aim of tort law. See, e.g., the English law case *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 (U.K.), where the Lord Hoffman states "[t]he view … that the law of torts should, in principle aspire to provide a comprehensive system of corrective justice, giving legal sanction to a moral obligation on the part of anyone who has caused injury to another without justification to offer restitution or compensation, had been abandoned in favour of a cautious pragmatism." This distinction is relevant considering the abuses of tort law remedies owed in part to "compensation culture," where, for example, an

law provides a civil avenue for an individual to have their claim addressed, which in of itself provides a benefit to the claimant by recognizing that they have experienced a harm. Failing to provide such an avenue, however, as section 230 does, runs contrary to this aim. A case currently being considered, *Gonzalez v. Google*, offers the Supreme Court an opportunity to restrict the oft-criticized expanded application of section 230 from Congress' original intentions.[9] *Gonzalez* is a civil claim arising from the death of Nohemi Gonzalez, a 23-year-old American citizen killed in the November 2015 ISIS terror attacks in Paris. The claim alleges that Nohemi's death is a consequence of "an interactive computer service…recommending other-party content, in this case for recommending ISIS proselytizing and recruitment videos," thereby falling out of "traditional editorial functions" as required by Judge Katzmann in his dissent in *Force v. Facebook, Inc.* for a platform provider to satisfy the section 230 "publisher" categorization.[10] Through *Gonzalez*, the Supreme Court may distinguish platforms from algorithms, stating that the section 230 defense applies to platform provider services but not the algorithms which they incorporate. Such a holding may permit individuals who have experienced algorithmic harms either directly or indirectly to bring a claim under tort law for redress against platform providers. This paper will consider the potential application of the tortious doctrine of strict product liability to algorithmic harms, demonstrating that the law does not need to substantially evolve to be a credible avenue for holding platform providers under civil law. An examination of the evolution of product liability demonstrates that the doctrine is well-positioned to provide accountability within novel forms of commercial relationships. Firstly, this paper will demonstrate that traditional restraints upon product liability claims, such as the "product" classification, can be overcome in the context of algorithmic harms. Secondly, preventative barriers between algorithmic harms and the requirements of strict product liability will be identified and reconciled through analogy to other legal constructions. Thirdly, the public policy considerations behind bridging the small gap between the needs of algorithmic harm claims and strict product liability will be analyzed. The low barriers to incorporating algorithmic harms into strict product liability provide further evidence that the doctrine is suited to deter abusive platform provider behavior via algorithms and compensate victims of algorithmic harms, leading to the achievement of justice.

I. Traditional Product Liability Restraints

The relationship between platform providers and consumers appears, at first glance, to be incredibly novel. While traditional commercial dealings are limited to the provision of certain acts or services, platform provider services can be accessed at will by the consumer, who pays in a

individual is over-awarded for the harm they suffered, leading to injustice and therefore an insufficient achievement of the aims of tort law.

[9] See, e.g., Letter from William P. Barr, United States Attorney General, to Hon. Michael R. Pence, President, United States Senate (Sept. 23, 2020); Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, Harvard Business Review (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230; Marguerite Reardon, Democrats and Republicans Agree That Section 230 Is Flawed, CNET (June 21, 2020, 5:00 AM), https://www.cnet.com/news/democrats-andrepublicans-agree-that-section-230-is-flawed/.

[10] Reynaldo Gonzalez v. Google LLC, (2022), cert.

variety of forms, including money, data, and time. The consumer's continued interactions with the platform provider benefit both parties to differing degrees. The consumer sometimes benefits through the receipt of hyper-tailored recommendations that align better with their needs and tastes. Platform providers financially profit by harvesting and aggregating consumer data to be sold to purchasers or to advertisers who will use it to be able to more easily access their target audience. What such a two-dimensional consideration of the longer-term platform provider and consumer relationship ignores, however, is that platform providers receive greater benefits from increasing platform usage, as reflected by their changed business models, thus encouraging them to take advantage of consumer data demonstrating mental illness or other weakness and greater susceptibility.[11] Concerns naturally arise as to whether there is an effective mechanism for redress for victims given the platform provider and consumer relationship. Optimistically, however, tort law has previously demonstrated its flexibility to adapt to provide redress to harmed individuals despite the novelty of certain types of commercial dealings. Strict product liability is a tortious doctrine borne from the growing need in the nineteenth century for a legal mechanism through which manufacturers of defective products could be held liable for harm flowing from the defect.[12] The industrial revolution gave rise to a new kind of relationship between producers and consumers. In contrast to smaller commercial dealings, mass production led to the expansion of the scope of commercial relationships and increased the distance between the producer and the consumer, leaving consumers with insufficient or nonexistent measures for recourse from product defects. Owing to its novelty, the mass production of defective products was previously not fully considered under civil law.[13] These technological shifts, coupled with the willingness to legally recognize this new commercial relationship, gave rise to tort law's incorporation of strict product liability.[14] Suggestions of now applying strict product liability to algorithmic harms are not novel but remain incomplete in assessing the grounds of incompatibility between the recognition of this particularly novel harm.[15] Mirroring the evolution of civil law to recognize alternate forms of personal harms, such as physical, economic, and emotional, throughout the nineteenth and twentieth centuries, tort law bears the potential to once again be recalibrated to acknowledge algorithmic harms. Although a variety of requirements must be satisfied for a successful product liability claim, the initial query of whether the defect in question arises from a *product* warrants particular reflection given the intangibility and unique distribution method of algorithms.

a. Product Versus Service Categorization

[11] Mary Madden, Michele Gilman, Karen Levy, and Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 053 (2017).
[12] George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL Stud. 461 (1985).
[13] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY, 3, (1st ed. 2003).
[14] *Id.* ("this new increase in cases in which the litigants had no prior relationship would not have been sufficient had it not come at a time when legal scholars were prepared to question and discard old bases of legal classification.")
[15] See, e.g., Grant W. Shea, *Applying Products Liability Law To Facebook's Platform and Algorithms: Addiction, Radicalization, and Real-World Harm*, 56 U. RICH. L. REV. 767 (2022).

To succeed under product liability, claimants must prove the existence of a defect within the harm-causing product.[16] Even if claimants can establish that algorithms are a defective product either individually or viewed within the context of broader computer software, they will also face the notable obstacle of disproving that algorithms are services.[17] If courts deem algorithms to function as services, no claims under strict product liability in its current form will succeed. Although the term "service" is incorporated into the label of a "platform service provider," that is not an inherent bar to courts finding that an algorithm does not constitute a service, since they may distinguish between the broader "service" of a platform versus the provision of the product that is an algorithm. There are two primary possibilities that arise, depending on whether courts analyze algorithms independently from general platform functions.

1. Platform Context-based Approach

Courts may choose to interpret algorithms within the context of the platforms which they support, allowing for a more nuanced view of the function of the algorithm. For example, a claimant alleging an algorithmic harm as a result of YouTube's recommendations would be able to more generally refer to "YouTube's algorithms" when bringing their claim, and courts would consider how algorithms function within YouTube specifically to drive algorithmic harms on the platform. If the courts take this stance, it may lead to blurred lines between the specific algorithms incorporated into the platform and the broader structure of the platform, such as display methods, notification systems, and interaction points. Hybrid sale-service transactions refer to transactions involving a combination of sales and services, either where the "product and service components are kept separate by the parties to the transaction" or where the "product component is consumed in the course of providing the service."[18] Although such transactions incorporate a service, they satisfy the definition of product so that a claim may be brought under strict product liability.[19] To successfully argue that algorithms are a hybrid sale-service transaction, claimants would have to demonstrate that the algorithm is a product and also is the predominant aspect of the "transaction" from provider to consumer viewed in totality of the platform provider function. The treatment of sale-service hybrid transactions may differ between courts depending on their interpretation of the Restatement of the Law of Torts in light of state statutes.[20] In delineating services from products, the Second District Court of Appeal paid regard to whether the provision of a product occurred incident to the provided service and whether the "dominant purpose" of the plaintiff's commercial relationship with the defendant was service-based.[21] Similarly, in New York, hybrid service-sale

[16] Restatement (Third) of Torts: Prod. Liab. § 1 (1998).
[17] *Id.* § 19(b) (1998); see, e.g., Michael C. Gemignani, *Product Liability and Software*, 8 Rutgers COMPUTER & TECH. L.J. 173, 176 (1981) ("The difficulty in trying to conceptualize computer programs in terms of products liability stems from the fact that programs must be considered within a range of categories as they undergo the transformation from 'birth' as algorithms to execution as part of a computer").
[18] Restatement (Third) of Torts: Prod. Liab. § 20 (1998).
[19] *Id.*
[20] See, e.g., *Malloy v. Doty Conveyor*, 820 F. Supp. 217, 220 (E.D. Pa. 1993) (applying Pennsylvania statute to determine whether the defendant was in the "chain of distribution" for the defective product).
[21] *Ontiveros v. 24 Hour Fitness USA, Inc.*, 169 Cal. App. 4th 424, 434, 86 Cal. Rptr. 3d 767, 775 (2008) ("the dominant purpose of plaintiff's membership agreement was to provide fitness services…the defendant was in the

transactions do not bar claims under strict product liability so long as the "sale aspect of the transaction predominates and the service aspect is merely incidental."[22] This standard requiring that algorithms specifically be the dominant aspect of the commercial "transaction" of platform utilization may prove difficult for claimants to overcome. While algorithms undoubtedly form the backbone of many platforms, courts may be convinced that they function as a means to circulate third-party content, and consequently are not dominant within the transaction of providing such content to consumers. Access to third-party content may be viewed as the predominant purpose provided by the platform. After all, a mere series of pure algorithms is generally unusable and unappealing to consumers. It is the interactive interface incorporating those algorithms that draws their attention. Under this view, platforms largely function as digital real estate, allowing for third-party placement of content in an accessible format. However, to take such a stance would be to ignore the fundamental changes made to platform structures due to evolving business practices. The business models of platform providers such as Google, Reddit, and TikTok rely on increasing a user's screen time, which is often achieved through the creation of addictive algorithms that intentionally recommend content to keep users on the platform.[23] Yet this argument could also be equally disputed. Although platform providers' business structures do aim to maximize consumption time, to which algorithms unquestionably contribute, that does not consequently necessitate that an algorithm is the predominant feature of the transaction from platform providers to consumers. To resolve this dispute, it is necessary to take the approach *of the consumer* here, and query whether the purpose of a consumer utilizing a platform, to a significant degree, is the algorithm. This analysis may differ between platforms, as algorithms are further integrated into some platforms over others or employ algorithms in different ways. Reddit, for example, stated in its Amicus Curiae brief for *Gonzalez* that in contrast to other platform services "the display of content on Reddit is…primarily driven by humans - not by centralized algorithms."[24] Reddit users have access to both a "Popular" page, displaying content that has generally received more recognition in the user's geographical area, along with a "Home" page, with personalized content tailored according to the user's selected "subreddit" subscriptions and other previous platform interactions.[25] In contrast, TikTok relies substantially more so on its algorithms to provide content to consumers, attracting individuals to the platform through a hyper-personalized "For You" page alongside a subscription-only page, with both providing little access to generally characterized

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business of providing fitness services and made exercise machines available to members as an incident to those services").

[22] *Levine v. Sears Roebuck & Co.*, 200 F. Supp. 2d 180, 192 (E.D.N.Y. 2002).

[23] Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. Davis L. Rev. 133-2014 (2017); Brief for Meta, Inc. as Amicus Curiae, p. 12, *Gonzalez v. Google LLC* (2023) (Meta stated that it, "like virtually all online services-uses algorithms to ensure that its services function in ways that attract and retain users and advertisers," emphasizing the pivotal nature of algorithms to its business structure and potentially attraction to exploit their consumer's weaknesses).

[24] Brief for Reddit, Inc. and Reddit moderators as Amicus Curiae, p. 2, *Gonzalez v. Google LLC* (2023); *but see* Adrienne Massanari, *#Gamergate and The Fappening: How Reddit's algorithm, governance, and culture support toxic technocultures*, 9 New Media & Society 13 (2016).

[25] Nicholas Proferes, Naiyan Jones, Sarah Gilbert, Casey Fiesler, Michael Zimmer, *Studying Reddit: A Systematic Overview of Disciplines, Approaches, Methods, and Ethics*, Social Media + Society (2021).

"popular" content.[26] Taking this approach, it may be comparatively easier to hold platforms such as TikTok liable, given that its algorithms form the predominant feature of the transaction. On this ground, earlier stage platform providers that do not share such a reliance upon algorithms due perhaps to lower algorithmic complexity or lesser content to recommend could be shielded from liability, therefore not resulting in a much-feared restriction to innovation.

2. Algorithm-Specific Approach

Alternatively, courts may consider algorithms in isolation from general platform functions. For example, a claimant alleging an algorithmic harm as a result of YouTube's recommendations may be required to identify which of YouTube's algorithms resulted in their harm, and the courts would consider how that algorithm or algorithms may be detrimental if viewed in isolation. An algorithm that might be incorporated into YouTube's algorithms would need to be reviewed and deemed a "defective" product regardless of which platform it is integrated into. If the algorithm in question was a Bidirectional Encoder Representations from Transformers (BERT) model, BERT models in general may have to be deemed "defective," regardless of where they are employed, leading to perhaps a list of algorithms that courts treat less favorably.[27] The benefit of such a practice would be to allow platform providers notice of which algorithms ought to be treated with greater caution, thereby providing them with greater certainty about potential degrees of liability. Such a list could be incredibly nuanced. While certain algorithms may qualify as "products" and as "defective" others may hold only one or neither of those traits. Additionally, viewing specific algorithms as defective could eventually decrease evidentiary requirements upon plaintiffs. Rather than a hyper specific, context-driven examination of an algorithm within a platform, plaintiffs could more easily demonstrate that the defendant platform provider makes use of an algorithm, as a product, deemed defective by the courts. Yet while this proposal may appear simple, it may prove more difficult in practice. Algorithms are often intertwined with one another, and it may be possible that, for instance, a BERT model used in combination with another algorithm actually leads to more favorable and less harmful results, thereby rendering the defectiveness label for BERT models inapplicable and misleading. Yet this may be a point for the defendant platform provider to prove, reducing the burden on claimants and allowing for reduced administrative costs overall in bringing claims of algorithmic harms.

Regardless of which position the courts decide to adopt, the "services" bar of product liability does not fully impede claims of algorithmic harm. Instead, it may function as an important buffer to better identify the harmful algorithm by providing a context-driven approach that continues to foster innovation or by reducing evidentiary burdens on plaintiffs and thus providing greater

[26] Aparajita Bhandari, Sara Bimo, *Why's Everyone on TikTok Now? The Algorithmized Self and the Future of Self-Making on Social Media*, 8 Social Media + Society 1 (2022) ("TikTok unprecedentedly centers algorithmically driven feeds and algorithmically driven experiences…").

[27] This could be strongly impactful to the business models of some platforms, which rely more heavily upon some algorithms over others. *See, e.g.*, Alphabet Inc. Q4 Earnings Call Transcript. (2022) ("language models like BERT and MUM have improved Search results for four years now, enabling significant ranking improvements and multimodal search…").